

Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages

ALLISON M. DUSSIAS*

This Article explores how U.S. law has adversely affected Native American languages, and how Native Americans have resisted explicit and implicit pressure aimed at eradicating their languages. Professor Dussias also examines parallels between arguments made by federal government policy makers to support the suppression of Native American languages and arguments made by contemporary "English-only" proponents who seek to make English the official language of the U.S. government.

[A] part of the educational process [for Indians] ought to be such an acquisition of the English language as will make it a natural and easy medium of communication among themselves and between them and their white fellow-citizens. That means the immediate disuse of the Indian languages and their final oblivion.

—Rev. J.A. Lippincott, 1897¹

It is the policy of the United States to . . . preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages.

—Native American Languages Act of 1990²

We must have English as the official language. We are a great country. . . . [W]e are one Nation under God. We need to have English spread throughout the land.

—Rep. John T. Doolittle 1996³

* Professor of Law, New England School of Law. J.D., University of Michigan, 1987; A.B., Georgetown University, 1984. I am grateful to the Board of Trustees and the Dean of New England School of Law for the summer research stipend that made this Article possible.

¹ Rev. J.A. Lippincott, *The Education of Indian Children into Citizenship—the Most Effective School*, in Proceedings of the Board of Indian Commissioners at the Fifteenth Lake Mohonk Indian Conference, 5th Sess., Oct. 15, 1897, reprinted in 1897 BOARD OF INDIAN COMM'RS ANN. REP. 57, 59.

² Native American Languages Act of 1990, 25 U.S.C. § 2903(1) (1994 & Supp. 1997).

³ 142 CONG. REC. H9765 (daily ed. Aug. 1, 1996) (statement of Rep. Doolittle).

I. INTRODUCTION

In 1995, the Office of Hawai'ian Affairs (OHA) filed suit against the Hawaii Department of Education, contending that the Department had failed to provide sufficient instruction in the Hawaiian language in the state's public schools. The OHA asserted that the Department had restricted Native Hawaiian students' right to express themselves in the Hawaiian language, thus violating the federal Native American Languages Act of 1990 (NALA).⁴ In 1996, the Hawaii Federal District Court rejected the OHA's claim, holding that Congress did not intend to create a direct private cause of action under NALA.⁵ Despite the government support for Native American languages that NALA indicated, the court treated the statute as no more than a statement of general government policy,⁶ rather than as a source of protection for Native American languages and those who speak them.

By rejecting the OHA's claim under NALA, the district court denied Native Hawaiians and other Native Americans⁷ the ability to use NALA as a tool in their longstanding struggle to preserve their languages and protect them against continuing assimilationist pressures and hostility toward linguistic diversity in the United States. NALA was enacted in recognition of, and as a rejection of, past government policies that encouraged the eradication of Native American languages as part of the movement to assimilate Native Americans into "American" culture,⁸ and as an acknowledgment of the United States' responsibility to ensure the preservation of Native American languages because of their critical importance to the survival of Native Americans' cultural and political integrity.⁹ Although *Office of Hawai'ian Affairs v. Department of*

⁴ See *Office of Hawai'ian Affairs v. Department of Educ.*, 951 F. Supp. 1484, 1493 (D. Haw. 1996). The OHA also alleged violations of the Hawaiian state constitution and a state statute, and of the First and Fourteenth Amendments to the U.S. Constitution. See *id.* at 1487.

⁵ See *id.* at 1494. The court also concluded that the plaintiff had no enforceable rights under 42 U.S.C. § 1983 (1994). See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1498; see also *infra* notes 398–449 and accompanying text (discussing the court's decision in the case).

⁶ See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1494.

⁷ The term "Native Americans" is used in this article to refer collectively to the groups commonly referred to as American Indians, Native Alaskans, and Native Hawaiians. The term "Indians" is used to refer to the indigenous peoples of the lower forty-eight states. Specific tribal identifications are given whenever possible, in recognition of the shortcomings of the foregoing terms.

⁸ See 25 U.S.C. §§ 2901, 2901(5) (1994) ("The Congress finds that . . . there is a lack of clear, comprehensive, and consistent Federal policy on treatment of Native American languages which has often resulted in acts of suppression and extermination of Native American languages and cultures."); see also *infra* notes 223–38 (discussing the findings section of NALA).

⁹ See 25 U.S.C. §§ 2901, 2901(1), 2901(5) ("The Congress finds that . . . the status of the

*Education*¹⁰ is the only reported decision considering the availability of a private cause of action under NALA,¹¹ if other courts follow the Hawaii district court's lead, and the support for Native American languages suggested by NALA is never translated into concerted efforts to undo the damage caused by past government assaults on these languages, NALA may well turn out to be as ineffective in protecting Native Americans' right to preserve their languages as another much-hailed federal statute, the American Indian Religious Freedom Act, has been in protecting Native Americans' right to practice their traditional religions.¹²

This Article analyzes the continuing struggle of Native Americans to preserve and revitalize their native languages, against the backdrop of concerted government efforts, beginning in earnest in the nineteenth century, to eradicate allegedly inferior Native American languages. The writings of government officials, missionaries, and educators reveal their determination to eradicate Native American languages and replace them with English, which they regarded as a unifying force and as a critical element in the efforts to "civilize" and assimilate Native Americans. They aimed, in effect, to "kill the Indian" with words—English words—rather than seeking the actual physical death of Native Americans. Although these writers focused their attention on Native American

cultures and languages of Native Americans is unique and the United States has the responsibility to act...to ensure the survival of these unique cultures and languages....[L]anguages...are critical to the survival of cultural and political integrity of any people....").

¹⁰ 951 F. Supp. 1484 (D. Haw. 1996).

¹¹ See *id.* at 1493 (noting that the availability of a private cause of action under NALA was an issue of first impression). Searches of Westlaw and LEXIS failed to turn up any other cases addressing the issue. Search of LEXIS, MEGA Library (Oct. 24, 1999); search of Westlaw, ALLCASES Database (Oct. 24, 1999).

¹² The American Indian Religious Freedom Act of 1978 (AIRFA) provides as follows:

[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.

42 U.S.C. § 1996 (1994). In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Supreme Court treated AIRFA as merely a statement of general policy, and held that it did not "create a cause of action or any judicially enforceable individual rights." 485 U.S. 439, 455 (1988). For further discussion of *Lyng*, see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 828-31 (1997); see also *infra* notes 451-57 and accompanying text (discussing *Lyng*).

languages, much of their rhetoric is echoed today in the arguments of the supporters of the “English-only” movement and others, in Congress and elsewhere, who demonstrate hostility toward all languages other than English and toward all linguistic diversity in the United States. Although NALA seemed to indicate a substantial change in government policy toward Native American languages, the lack of enthusiasm for establishing extensive programs to preserve and revitalize Native American languages and the repeated introduction of English-only bills in Congress suggest that the war that was waged against Native American languages beginning in the nineteenth century has never really ended—its tactics have just changed.

Part I of this Article analyzes the history of the efforts of federal government policy makers and their allies to eradicate Native American languages and to require Native Americans to speak English as part of the assimilation process, and examines Native American resistance to these efforts. Part II discusses the federal government’s treatment of Native American languages in the twentieth century. The government recognized Native American languages as having some value during World War II, when Navajo and other Native American “code talkers,” utilizing their native languages in military communications, played an important role in the war effort. The languages’ value to the government in wartime stemmed from their very obscurity—a condition that had been promoted by past government efforts to eradicate them. The appreciation of the usefulness of Native American languages in wartime communications did not, however, translate into respect for or protection of the languages once the war was over. In fact, long after the war ended, the Navajo code talkers were required to keep their role secret, much as they had been required to conceal the use of their native language as students in government schools to avoid punishment. It was not until the enactment of the NALA that the federal government formally acknowledged the adverse effect of past policies on Native American languages and recognized the importance of preserving them. The repeated introduction in Congress, however, of various “English-only” and “official English” bills, most recently in January 1999, demonstrates the continued hostility of at least some lawmakers toward linguistic diversity. Part II includes analysis of the NALA, its 1992 sequel, and recent English-only and official English bills. Part III then analyzes the current status of the struggle for the preservation of Native American languages. Part III pays particular attention to *Office of Hawai’ian Affairs v. Department of Education* and to the efforts of contemporary Native Americans to protect and revitalize their native languages. The Conclusion offers some final thoughts on the importance of preserving Native American languages and on the need to do more to support their revitalization and protection.

II. SUPPRESSING NATIVE AMERICAN LANGUAGES: THE UNITED STATES' ORIGINAL ENGLISH-ONLY POLICY

This language [English], which is good enough for a white man and a black man, ought to be good enough for the red man The first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them the English language. The impracticability, if not impossibility, of civilizing the Indians of this country in any other tongue than our own would seem to be obvious [W]e must remove the stumbling-blocks of hereditary customs and manners, and of these language is one of the most important elements.¹³

Soon after their first contacts with the indigenous peoples of the North American continent, Europeans sought to replace the aboriginal languages of these peoples with their own languages. The efforts of the French and Spanish, and later the English, to teach Native Americans European languages went hand in hand with efforts to convert them to Christianity. The U.S. government adopted the policy of eradicating the allegedly inferior Native American languages and replacing them with English in the schools that it established and supported to educate Indian children. The children, however, were not always as willing to give up their languages as school officials expected them to be, and the determination of some of them to speak their own languages, even in the face of corporal punishment by school officials, demonstrated their resistance to the government's planned linguistic and cultural genocide of Native Americans.

A. *Early European Attitudes Toward Native Languages in North America*

When questioned by Queen Isabella of Spain about the usefulness of a Castilian Spanish grammar published in 1492, the Bishop of Avila replied: "Your majesty . . . language is the perfect instrument of empire."¹⁴

Despite its current preeminence in the United States, and the desire of contemporary English-only proponents to preserve English's time-honored and allegedly threatened dominance, English was not the first language that Europeans introduced to the North American continent. Long before the U.S. government sought to replace Native American languages with English, individuals supported by other governments practiced their own linguistic imperialism by imposing their languages on the indigenous peoples of North

¹³ 1887 COMM'R OF INDIAN AFFAIRS ANN. REP. xxiii [hereinafter 1887 CIA REPORT].

¹⁴ LEWIS HANKE, *ARISTOTLE AND THE AMERICAN INDIANS* 8 (1959). This work was the first grammar to be compiled for a modern European language. *See id.*

America. Franciscan missionaries, mostly from Spain, who arrived in the southwestern part of the future United States with the Spanish explorer Francisco Vasquez de Coronado in the first half of the sixteenth century, taught Spanish, along with Roman Catholicism and agricultural and trade skills, to Indians in Arizona, California, New Mexico, and Texas.¹⁵ In 1534, French explorer Jacques Cartier abducted two Iroquoians, who were taken to France to learn French and were brought back to Canada the following year to act as interpreters.¹⁶ French Jesuits served as missionaries in the area along the St. Lawrence River, in the Great Lakes area, and in the area along the Mississippi River beginning in 1611.¹⁷ They taught French language and customs, academic subjects, and

¹⁵ See ESTELLE FUCHS & ROBERT J. HAVIGHURST, *TO LIVE ON THIS EARTH: AMERICAN INDIAN EDUCATION* 2 (1972). Coronado entered the southwestern part of what is today the United States in 1540. See ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 23-24 (8th prtg. 1985). He was accompanied by Fray Marcos de Niza and other Franciscans. See *id.* Fray Marcos had prepared the way for Coronado's expedition by leading a reconnaissance mission in 1539. See *id.* at 23. Missionaries were also active in other areas claimed by Spain, such as Florida, where a school was established by Jesuits in 1568. See Jon Reyhner & Jeanne Eder, *A History of Indian Education*, in *TEACHING AMERICAN INDIAN STUDENTS* 33, 35 (Jon Reyhner ed., 1992). In 1612, the Spanish missionary Father Pareja published the first of several books in the Florida Indians' Timucuan language. See DEBO, *supra*, at 67. By the mid-seventeenth century, Spain mandated the imposition of Spanish on native peoples. See GEORGE E. TINKER, *MISSIONARY CONQUEST: THE GOSPEL AND NATIVE AMERICAN CULTURAL GENOCIDE* 49 (1993). By 1790, roughly twenty-three thousand speakers of Spanish resided in Arizona, California, New Mexico, and Texas. See Juan F. Perea, *Democracy and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 316 (1992). Spanish continued to be important in the Southwest following its introduction. For example, California's first constitution officially recognized both Spanish and English, and government documents were published in Spanish and English until the California Constitution of 1879 banned the publication of laws in any language but English. See *id.* at 317-19. In New Mexico, there were only about one hundred English speakers in the territory until 1846; the organic laws of the territory were published in a Spanish and English edition in that year. See *id.* at 320. The laws continued to be published in both languages throughout the nineteenth century. See *id.* at 320-21. When New Mexico adopted a constitution in 1911, it required that laws be published in both English and Spanish for twenty years, a requirement that was later extended until 1953. See *id.* at 323.

¹⁶ See JAMES AXTELL, *THE INVASION WITHIN: THE CONTEST OF CULTURES IN COLONIAL NORTH AMERICA* 24-25 (1985).

¹⁷ See FUCHS & HAVIGHURST, *supra* note 15, at 2; see also CAROL DEVENS, *COUNTERING COLONIZATION: NATIVE AMERICAN WOMEN AND GREAT LAKES MISSIONS, 1630-1900*, at 9 (1992) (noting that Jesuit missionary activities in the area known as New France began in 1611 when two Jesuits arrived to proselytize Abenakis near Port Royal, in what is today Nova Scotia). Another religious order, the Recollects, arrived in Quebec in 1615. See AXTELL, *supra* note 16, at 37. Both the Recollects and the Jesuits initially sent Indian children to France to learn French. See *id.* at 55-56. French nuns, who came to play an important role in teaching Indian children, first arrived in French Canada in 1639. See *id.* at 40. In the United States,

Roman Catholicism to Indian children.¹⁸ Thus, despite the current enthusiasm of English-only advocates for the English language as the premier language of the United States, Spanish and French, rather than English, were the original European languages in North America.

In 1617, King James I of England called for the education of the Indians, which would include the teaching of English, and Protestant clergymen responded by establishing institutions for the education of Indian youths.¹⁹ King James also indicated an interest in the conversion of the Indians to Christianity, which was reflected in the first charter he gave for the colonization of Virginia.²⁰ Thus, Indian education, in English and other subjects, and Christian religious indoctrination went hand in hand as the English began colonization of North America.

For English immigrants to North America who were interested in the conversion of the Indians to Christianity, the language difference between themselves and the Indians posed a formidable barrier. Because of the importance English missionaries attached to reading the Bible and religious works, many of them sought to promote Indian literacy as part of the effort to convert the Indians to Christianity.²¹ Some translated the Bible and other works

French has enjoyed its greatest longevity in Louisiana. The land containing the future state of Louisiana became a United States territory in 1803, and the first laws governing the territory were published in French and English in 1804. *See* Perea, *supra* note 15, at 323–24. Between 1803 and 1867, laws were published in both languages. *See id.* at 324. Although the 1879 state constitution authorized the publication of laws in French as well as English, as did the 1913 Constitution, as a result of the political ascendancy of English speakers, after 1881 no French editions of the laws were published. *See id.* at 325–26, 325 n.319.

¹⁸ *See* FUCHS & HAVIGHURST, *supra* note 15, at 2. In their initial efforts to convert Native Canadians to Christianity, some French missionaries in Canada believed that it was expedient to try to learn their languages, which the missionaries found to be a humbling experience. *See* AXTELL, *supra* note 16, at 81–83.

¹⁹ *See* FUCHS & HAVIGHURST, *supra* note 15, at 2. Dartmouth College and Harvard College were established for the education of English and Indian youth. *See id.*; *see also* Reyhner & Eder, *supra* note 15, at 35 (noting that in 1617 King James asked for the collection of funds to erect “churches and schools for ye education of ye children of these Barbarians in Virginia” and that Harvard was founded in 1636 in part to educate Indians).

²⁰ *See* DEBO, *supra* note 15, at 40. The first Virginia charter expressed the desire that the native inhabitants be brought to “the true Knowledge and Worship of God.” *Id.* Similarly, the charter later given to Massachusetts by James I’s successor, Charles I, indicated that the conversion of the native inhabitants was “the principal ende of this plantation.” *See id.* at 47.

²¹ *See* ROBERT F. BERKHOFFER, JR., SALVATION AND THE SAVAGE: AN ANALYSIS OF PROTESTANT MISSIONS AND AMERICAN INDIAN RESPONSE, 1787–1862, at 2–6 (1965) (discussing organizations that focused on the spreading of the Gospel among the Indians, the importance attached to reading the Bible, and the perceived relationship between civilization, including reading, and Christianization).

into Indian languages.²² Other missionaries, however, preferred to teach the Indians English rather than utilizing Indian languages, which they viewed as barbarous and inadequate mediums for conveying Christian doctrines and as incompatible with efforts to foster the civilization of the Indians.²³ Indeed, by referring to the Indians themselves as “barbarous” and “barbarians”—words which originally referred pejoratively to the unintelligible sounds of the languages spoken by foreigners²⁴—the English and other Europeans in effect branded the Indians as inferior on the basis of their languages.

Many of the same religious groups that struggled to teach Indians English in order to convert them to Christianity also undertook to establish schools for Indian children, in which learning English was the first order of business. For example, many of the so-called “praying towns” established in Massachusetts by seventeenth-century Puritan missionary John Eliot to concentrate Indians for conversion also established their own schools, at which all aspects of tribal culture were targeted for obliteration.²⁵ Schools like these were just the beginning of the role of religious groups in Indian education. In fact, until late in

²² See, e.g., AXTELL, *supra* note 16, at 184 (describing John Eliot’s translation of fourteen works into the Natick dialect); WILLIAM G. MCLOUGHLIN, CHAMPIONS OF THE CHEROKEES: EVAN AND JOHN B. JONES 35–40, 149–50, 225–26 (1990) (describing translations into Cherokee); WILLIAM G. MCLOUGHLIN, CHEROKEES AND MISSIONARIES, 1789–1839, at 184 (1984) (describing the Cherokee Sequoyah’s disappointment that his Cherokee syllabary was being used by missionaries for translating Christian works). For a critique of Puritan missionary John Eliot’s efforts to convert Indians in New England to Christianity, see TINKER, *supra* note 15, at 21–41. In 1643, Roger Williams published a work entitled *A Key into the Language of America*, which compiled words in the Narragansett language, including words related to religion. See ROGER WILLIAMS, A KEY INTO THE LANGUAGE OF AMERICA 189–200 (John J. Teunissen & Evelyn J. Hinz, eds., Wayne State Univ. Press 1973) (1643).

²³ See, e.g., AXTELL, *supra* note 16, at 185 (discussing the views on the necessity for barbarous peoples to learn a civilized people’s language in order to change their religion held by Daniel Gookin, a seventeenth-century Massachusetts Indian superintendent and ally of Puritan missionary John Eliot); BERKHOFFER, *supra* note 21, at 33 (discussing the moral and religious significance that missionaries attached to English); ANTHONY PAGDEN, THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY 182–83 (1982) (discussing the deficiencies attributed to Indian languages as mediums for conveying Catholicism); see also AXTELL, *supra* note 16, at 108–09 (describing the difficulties that French missionaries had in finding native words for certain Christian concepts). Puritan missionaries believed that once the Indians understood English, they could better understand preaching by English-speaking ministers, who apparently were not expected to learn Indian languages. See *id.* at 185.

²⁴ See WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 122 (2d College ed. 1979); see also Dussias, *supra* note 12, at 813 n.289 (discussing the derivation of the word “barbarous”).

²⁵ See MICHAEL C. COLEMAN, AMERICAN INDIAN CHILDREN AT SCHOOL, 1850–1930, at 36–37 (1993).

the nineteenth century, most Indian education in the United States was carried out by religious groups, whose educational endeavors were financed with funds raised by the groups themselves and provided by the federal government.²⁶ Following in Eliot's footsteps, these groups sought to replace tribal culture, including Indian languages, with Christianity, Euro-American civilization, and the language of Euro-American society.²⁷

B. *The Pre-Eminence of English in the U.S. Government's Indian Schools*

In the difference of language to-day lies two-thirds of our trouble Schools should be established, which children should be required to attend; their barbarous dialect should be blotted out and the English language substituted.²⁸

1. *Indian Languages and the Peace Policy*

In 1867, Congress authorized the Indian Peace Commission (Peace Commissions), thus adopting the policy of preferring an outwardly peaceful solution to the problems believed to arise from the continued presence of Indians over the military solution suggested by westerners and others.²⁹ The Peace Commission was expected to negotiate treaties and arrange for the resettlement of tribes on reservations; if the Peace Commission failed in its task, military force could be used against the tribes.³⁰ Although, at least initially, Indians were to be spared the actual genocide for which some westerners clamored, they were

²⁶ See *id.* at 38–39. Government funding came from the “civilization fund,” which was established by Congress in 1819 to promote the civilization of the Indians, and from government grants authorized by treaties. See *id.* at 39. For a discussion of the role of religious groups in Indian education, see Dussias, *supra* note 12, at 784–86.

²⁷ See COLEMAN, *supra* note 25, at 40.

²⁸ 1887 CIA REPORT, *supra* note 13, at xx (quoting the Report of the Indian Peace Commission).

²⁹ See Reyhner & Eder, *supra* note 15, at 41; see also Act of July 20, 1867, 15 Stat. 17–18, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 105–06 (Francis Paul Prucha ed., 2d ed. 1990) [hereinafter PRUCHA, DOCUMENTS].

³⁰ The statute authorizing the Peace Commission empowered it to ascertain the reasons for “hostile” Indian activities, to make treaties, and to establish reservations “to receive all the Indian tribes now occupying territory east of the Rocky mountains, not now peacefully residing on permanent reservations under treaty stipulations.” Act of July 20, 1867, 15 Stat. 17–18, reprinted in PRUCHA, DOCUMENTS, *supra* note 29, at 105–06. The authorizing legislation demonstrated that Congress did not completely abandon the idea of a military solution for continuing conflicts with the Indians when it embraced the idea of a Peace Commission by providing that if it failed to obtain Indian consent to remove to reservations and failed to secure peace, the Secretary of War was authorized to enlist up to four thousand volunteers, to serve for as long as he believed was “necessary for the suppression of Indian hostilities.” *Id.*

still targeted for cultural (including linguistic) genocide.³¹ Words—English words—were the weapons of choice for carrying out the planned linguistic genocide. If the overall message was that the proper course of action was to “kill the Indian and save the man,” as Carlisle Indian School superintendent Captain Richard Henry Pratt put it,³² then, as far as his language was concerned, the Indian would be killed with words.

The members of the Peace Commission came to believe that language differences had led to past misunderstandings between Indians and Euro-Americans and that if Indian children had been taught English, “these differences would have disappeared, and civilization would have followed at once”³³ The Peace Commission recommended the establishment of schools and the adoption of a compulsory attendance policy; in these schools, Indian languages could be eradicated and replaced with English.³⁴

President Grant’s “Peace Policy,” launched in 1869, also emphasized the importance of focusing government attention on “civilizing” the Indians, which would include expanded federal aid to support Indian education.³⁵ The Board of

³¹ See Reyhner & Eder, *supra* note 15, at 41–42. Commissioner of Indian Affairs Nathaniel G. Taylor had written in 1867 that there were two alternatives left for the future of Indians: “swift extermination by the sword and famine, or preservation by gradual concentration on territorial reserves, and civilization.” JOHN J. KILLOREN, “COME, BLACK ROBE”: DE SMET AND THE INDIAN TRAGEDY 296 (quoting S. EXEC. DOC. NO. 40-13, at 5 (1867)). Taylor’s preference for the latter course of action was incorporated in the bill that ultimately created the Peace Commission. *See id.* at 297.

³² See Richard H. Pratt, Remarks at the Nineteenth Annual Conference of Charities and Correction, in OFFICIAL REPORT OF THE NINETEENTH ANNUAL CONFERENCE OF CHARITIES AND CORRECTION, reprinted in AMERICANIZING THE AMERICAN INDIANS: WRITINGS OF THE “FRIENDS OF THE INDIAN” 1880–1900, at 260–61 (Francis Paul Prucha ed., Bison Books 1978) (1973) (“[A]ll the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”). Pratt served as superintendent of Carlisle from 1879–1904. *See id.* at 260; *see also* Francis Paul Prucha, *Introduction* to PRUCHA, DOCUMENTS, *supra* note 29, at 1 (“[T]hey resolved to do away with Indianness and to preserve only the manhood of the individual Indian.”).

³³ REPORT OF THE INDIAN PEACE COMM’N, H.R. EXEC. DOC. NO. 40-97, at 15–17 (1868), excerpt reprinted in PRUCHA, DOCUMENTS, *supra* note 29, at 106–07. The members of the Peace Commission experienced some of the misunderstandings caused by language differences firsthand in their investigations and treaty negotiations with tribal leaders, in which they found themselves forced to depend upon interpreters of questionable competence. *See KILLOREN, supra* note 31, at 302.

³⁴ *See* REPORT OF THE INDIAN PEACE COMM’N, H.R. EXEC. DOC. NO. 40-97, at 16–17 (1868), quoted in Reyhner & Eder, *supra* note 15, at 41.

³⁵ *See* ROBERT H. KELLER, JR., AMERICAN PROTESTANTISM AND UNITED STATES INDIAN POLICY, 1869–82, at 17 (1983). The Board of Indian Commissioners recommended the establishment of more schools for Indians in its first annual report. *See* 1869 BOARD OF INDIAN

Indian Commissioners, which was established as part of the Peace Policy to oversee the conduct of the Bureau of Indian Affairs (the Bureau),³⁶ stated in its first annual report that “[s]chools should be established, and teachers employed by the government to introduce the English language in every tribe . . . [M]any of the difficulties with Indians occur from misunderstandings as to the meaning and intention of either party.”³⁷ To men like the members of the Board of Indian Commissioners, apparently it went without saying that future failures in communication between Indians and Euro-Americans could best be prevented by having the Indians learn English, rather than by Euro-Americans learning Indian languages. The Grant administration’s enthusiasm for Indian education was also reflected in the creation of a division of education and medicine within the Bureau in 1873.³⁸

The Peace Policy provided the first significant government aid to Indian education and led to the institutionalization of Indian educational programs within the Bureau.³⁹ Although religious groups continued to operate some schools for Indians, henceforth the government would play a crucial role in directing the educational institutions in which Indian languages were to be eradicated and replaced with English.⁴⁰

COMM’RS ANN. REP. 10 [hereinafter 1869 BIC REPORT].

³⁶ See KELLER, *supra* note 35, at 17–19. The Bureau of Indian Affairs, also called the Indian Bureau or Office of Indian Affairs, was created within the Department of War in 1824 but was transferred to the Department of the Interior in 1849. See COLEMAN, *supra* note 25, at 38. In addition to the creation of the Board of Indian Commissioners, the Peace Policy’s initiatives included the granting of control over the appointment of reservation agents to various religious groups. See KELLER, *supra* note 35, at 17–18; see also Dussias, *supra* note 12, at 778–82 (discussing the launching of the Peace Policy, the creation of the Board of Indian Commissioners, and the allotment of the Indian agencies among Christian religious groups).

³⁷ 1869 BIC REPORT, *supra* note 35, at 10. The Board recommended that the teachers for each new school be nominated by the religious group with a mission closest to the reservation on which the school was being established. See *id.* The Board also favored encouraging the establishment of Christian missions and the fostering of their schools. See *id.*

³⁸ See KELLER, *supra* note 35, at 205–06.

³⁹ See COLEMAN, *supra* note 25, at 41; KELLER, *supra* note 35, at 206. Indian education expanded at a rapid pace after 1876. See KELLER, *supra* note 35, at 206. Government support of Indian schools rose for the remainder of the century. Appropriations increased from \$20,000 in 1870 to almost \$3,000,000 in 1900. See COLEMAN, *supra* note 25, at 41. The number of government schools increased from 150 schools, enrolling over 3000 pupils, in 1877, to 307 schools, enrolling over 21,000 pupils, in 1900. See *id.*

⁴⁰ The federal government particularly increased its efforts to educate Indians in conjunction with the enactment of the General Allotment Act, or Dawes Act, in 1887. By that year, Congress’s appropriation for Indian education amounted to over \$1,000,000 per year, roughly half of which went to religious groups that operated schools under contracts with the government, dubbed “contract schools.” See Reyhner & Eder, *supra* note 15, at 47. The Dawes

2. *The Establishment of the English-Only Policy*

By the 1880s, federal government officials had decided that the best way to foster English among Indians was to teach English to Indian schoolchildren. Although few adult Indians could speak English, it was hoped that if their children were targeted for English instruction, the next generation of Indians would speak and use English sufficiently “to enable them to become acquainted with the laws, customs, and institutions of our country.”⁴¹ Officials believed that English could best be taught by immersing students in English and suppressing the use of Indian languages. They used the dominant role in Indian education that they had begun to assume under the Peace Policy to translate these beliefs into action. To this end, in 1885 the Bureau issued regulations providing the following:

All instruction must be in English, except in so far as the native language of the pupils shall be a necessary medium for conveying the knowledge of English, and the conversation of and communications between the pupils and with the teacher must be, as far as practicable, in English.⁴²

Thus, the Indian schools were required to not only teach students fluency in English, but also to use English as the medium for all instruction and all conversations between teachers and students. In schools that educated students from a number of tribes, English could serve, in effect, as the “lingua franca” of the students.⁴³

The English-only policy applied to all Indian schools, not just those operated directly by the federal government, and thus covered schools operated by religious groups under contracts with the government, which were known as

Act established authority for the division of selected reservations into allotments for individual Indians. See General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C. (1994)). For an analysis of the Dawes Act, see generally Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637 (1999).

⁴¹ 1887 CIA REPORT, *supra* note 13, at xx (quoting 1885 COMM’R OF INDIAN AFFAIRS ANN. REP.); see also *id.* at xxv (stating that Indian youths “are now in the teachable age; if they are ever to learn English they must learn it now—not when they have become men with families”).

⁴² *Id.* at xx.

⁴³ See COLEMAN, *supra* note 25, at 105. Some students instead used sign language or the language of another tribe to communicate with each other. See *id.* at 140 (describing the use of sign language and an Ojibway student’s use of Sioux to communicate with his girlfriend).

“contract schools.”⁴⁴ The policy was reiterated in orders sent to reservation agents⁴⁵ and in the annual reports of the Commissioner of Indian Affairs.⁴⁶

Teachers in Indian schools were expected to have achieved “mastery of idiomatic English,” in order to ensure that they would be well-equipped to face the difficult task of replacing Indian languages with English.⁴⁷ Indian children were to be taught to speak English first, with reading and writing to follow.⁴⁸ In the “Course of Study” developed by the Commissioner of Indian Affairs for use in Indian schools, learning English was designated the main area of study for first-year students,⁴⁹ and by the end of four years of instruction students were

⁴⁴ See 1887 CIA REPORT, *supra* note 13, at xxii; see also *supra* note 40 (defining contract schools).

⁴⁵ The 1887 report of the Commissioner of Indian Affairs quoted orders to reservation agents with respect to the policy with the following dates: Dec. 14, 1886 (“In all schools conducted by missionary organizations it is required that all instruction be given in the English language.”); Feb. 2, 1887 (“[T]he [English-only] rule applies to all schools on Indian reservations . . . [N]o school will be permitted . . . in which the English language is not exclusively taught.”); and July 16, 1887 (“Your attention is called to the regulation of this office which forbids instruction in schools in any Indian language . . . You are instructed to see that this rule is rigidly enforced in all schools upon the reservation . . .”). See 1887 CIA REPORT, *supra* note 13, at xxii. In 1887, a circular was sent to all groups that had contracted with the government to operate schools for Indians to remind them that they were to provide an English education, and therefore “no books in any Indian language were to be used or instruction given in that language.” *Id.* (quoting the circular, dated July 16, 1887).

⁴⁶ See, e.g., 1887 CIA REPORT, *supra* note 13, at xx (citing 1885 COMM’R OF INDIAN AFFAIRS ANN. REP.) (noting that the 1885 report mentioned the importance of teaching Indians English); *id.* at xxi (quoting 1886 COMM’R OF INDIAN AFFAIRS ANN. REP. (“Indians should be taught the English language only.”)); *id.* at xxi–xxii (discussing the English-only policy).

⁴⁷ THOMAS J. MORGAN, SUPPLEMENTAL REPORT ON INDIAN EDUCATION, Dec. 1, 1889, in 1889 COMM’R OF INDIAN AFFAIRS ANN. REP. 93, 105 [hereinafter 1889 CIA REPORT]. See *id.* at 95 (stating that “only English-speaking teachers should be employed in schools supported in whole or in part by the government”).

⁴⁸ See, e.g., DANIEL DORCHESTER, REPORT OF THE SUPERINTENDENT OF INDIAN SCHOOLS, Sept. 11, 1890, in 1890 COMM’R OF INDIAN AFFAIRS ANN. REP. 246, 267–68 [hereinafter 1890 CIA REPORT] (stating that literary instruction “should include primarily English speaking, to be followed by drawing, reading, writing, and spelling”); W.N. HAILMANN, REPORT OF THE SUPERINTENDENT OF INDIAN SCHOOLS, Sept. 26, 1896, in 1896 COMM’R OF INDIAN AFFAIRS ANN. REP. 339, 339 [hereinafter 1896 CIA REPORT] (stating that “the child must learn to speak English intelligently before he can be taught to read it intelligently”); Myrtilla Jewell Sherman, The Teaching of English in Indian Schools, Address Before the Department of Indian Education, Charleston, S.C., undated, in 1900 COMM’R OF INDIAN AFFAIRS ANN. REP. 465, 465 [hereinafter 1900 CIA REPORT] (stating that “[n]ot until the child can express his thoughts orally should he be required to write it” [sic]).

⁴⁹ See 1890 CIA REPORT, *supra* note 48, at clvi.

expected to be able to speak English “fluently and correctly.”⁵⁰

Government officials gave a number of reasons for the perceived need for Indians to learn English. First, they viewed language as playing a particularly important role in the assimilation of the Indians and the eradication of Indian cultures. Language, they believed, was inextricably tied to national character and national unity. The Commissioner of Indian Affairs noted in 1887, for example, that “[n]othing so surely and perfectly stamps upon an individual a national characteristic as language.”⁵¹ Unless different peoples spoke the same language, he believed, there could be “[n]o unity or community of feeling among them” and they could not have “like ideas of duty.”⁵² The multiplicity of Indian languages was seen as a serious handicap to their usefulness.⁵³ Only uniformity of language would ““fuse them into one homogeneous mass””⁵⁴ and lead Indians to assimilation, in their thoughts and actions, into the Euro-American way of life, as the 1868 report of the Peace Commission noted: ““Through sameness of language is produced sameness of sentiment, and thought; customs and habits are moulded and assimilated in the same way””⁵⁵ Thus, English was expected to have a profound transformative effect on the Indians who managed to learn it.

The perceived link between language uniformity and national unity and homogeneity led to comparisons being drawn, in terms of language, between Indians and immigrants. Indians undoubtedly would have been surprised to learn that, in some discussions of the English-only policy, they were referred to as “foreigners”⁵⁶ and their languages were labeled foreign languages.⁵⁷ English was

⁵⁰ *Id.* at clviii. The students were also expected to be able to recognize, pronounce, spell, and write all of the words in the first two readers and in general to have accomplished what would usually be expected of children who had attended the public schools for two years. *See id.* The slower progress expected of Indian students was explained by the fact that they were learning a language that was foreign to them and had to spend some time in industrial education. *See id.*

⁵¹ 1887 CIA REPORT, *supra* note 13, at xxi.

⁵² *Id.* at xxii.

⁵³ *See id.* at xxiii; *see also id.* at xxiv–xxv (stating that Indians “use a hundred dialects, many of which are as unintelligible to those speaking the other dialects as Sanscrit [sic] is to the average New England schoolboy”); 1890 CIA REPORT, *supra* note 48, at v (stating that “the various tribes differ so essentially among themselves in languages”).

⁵⁴ 1887 CIA REPORT, *supra* note 13, at xx (quoting the Report of the Indian Peace Commission).

⁵⁵ *Id.*

⁵⁶ *See, e.g., id.* at xxv (“If the Indian is always to be a tribal Indian and a foreigner”) (quoting an unnamed religious weekly). The Commissioner of Indian Affairs claimed in 1904, however, that Indians were “far superior to thousands of foreign immigrants who annually throng our ports and pass, in a few years, to full citizenship, with no appreciation

expected to be as transformative for Indians, and for Indian children in particular, as it was believed to be for immigrants: "the children of foreigners taken into our public schools, where they learn the English language and associate with our children, imbibe their ideas and grow up to be in all respects Americans in spirit, in habits, and in character."⁵⁸

Government officials offered the additional argument that replacing Indian languages with English was in the Indians' best interests,⁵⁹ at least as those interests were defined by the government. The officials alleged that Indians suffered from injustice in their business dealings with whites because they could not speak English.⁶⁰ Only by being able to speak English, officials argued, could Indians profit from greatly increasing dealings with whites.⁶¹

In addition to making Indians good businessmen, English was expected to make them good citizens. Knowledge of English, officials argued, would enable the Indians "to become acquainted with the laws, customs, and institutions of our country"⁶² and was essential to the Indians' "comprehension of the duties and obligations of citizenship."⁶³ Only through English could the Indians "acquire a knowledge of the Constitution of the country and their rights and duties thereunder."⁶⁴

of our aspirations or knowledge of our laws or language." 1904 COMM'R OF INDIAN AFFAIRS ANN. REP. 30 [hereinafter 1904 CIA REPORT].

⁵⁷ See 1887 CIA REPORT, *supra* note 13, at ix (stating that Indian education embraces "the supplanting of a foreign language by the English").

⁵⁸ 1891 COMM'R OF INDIAN AFFAIRS ANN. REP. 53 [hereinafter 1891 CIA REPORT].

⁵⁹ See, e.g., 1887 CIA REPORT, *supra* note 13, at xxii (stating that strict enforcement in reservation schools of the English-only policy was "for the very best interest of the Indian"); *id.* at xxiv (stating that the Commissioner was governed solely by what he "believed to be the real interests of the Indians").

⁶⁰ See, e.g., *id.* at xxiv (citing an unnamed former missionary to the Sioux).

⁶¹ See *id.* at xxv (quoting an unnamed religious weekly); see also *id.* at xxi (stating that educating Indians would allow them "to transact business with English-speaking people").

⁶² *Id.* at xx (quoting 1885 COMM'R OF INDIAN AFFAIRS ANN. REP.).

⁶³ *Id.*; see also *id.* at xxv (quoting an unnamed religious weekly and stating that Indian youths should be instructed "in that language by using which alone they can be qualified for the duties of American citizenship"; the English-only policy "is absolutely necessary if the Indian is ever to be fitted for the high duties of American citizenship"). Citizenship was not extended to all Indians until the enactment of the Citizenship Act of 1924. See Act of June 2, 1924, ch. 233, 43 Stat. 253. The U.S. Code currently provides that "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe" is a U.S. citizen. 8 U.S.C. § 1401(b) (1994).

⁶⁴ 1887 CIA REPORT, *supra* note 13, at xxi; see also *id.* ("True Americans all feel that the Constitution, laws, and institutions of the United States . . . are superior to those of any other country; and they should understand that by the spread of the English language will these laws and institutions be more firmly established and widely disseminated.").

In trying to justify the English-only policy, officials also appealed to precedents, both at home and abroad, for the imposition of a single language. The Commissioner of Indian Affairs claimed in 1887 that “nations the world over, in both ancient and modern times, have ever imposed the strictest requirements upon their public schools as to the teaching of the national tongue.”⁶⁵ He gave as an example of this policy the order of the German Empire prohibiting the teaching of French in public and private schools in Alsace and Lorraine, where the people, though generally opposed to German rule, were “firmly held to political allegiance by the military hand of the Iron Chancellor.”⁶⁶ If the imposition of a language was appropriate for Europeans, it was assumed to be appropriate for Indians as well. In the United States itself, the Commissioner stated, English had been imposed in the public schools in territories acquired from Spain, Mexico, and Russia.⁶⁷ Perhaps Indians were expected to take comfort in the knowledge that their languages were not being singled out for particularly harsh treatment by officials determined to destroy all linguistic diversity in the United States.

Officials may also have expected Indians to take comfort in the claimed premier status of the particular language that was to be imposed upon them. They deemed the English language “the language of the greatest, most powerful, and enterprising nationalities beneath the sun.”⁶⁸ This language, as taught in America, was deemed “good enough for all her people of all races,”⁶⁹ and was believed to allow for independent thought and action⁷⁰ and to sow the seeds for a change from savagery to civilization.⁷¹ English also had numbers on its side, as it

⁶⁵ *Id.*

⁶⁶ *Id.* at xxii.

⁶⁷ *See id.* at xxi.

⁶⁸ 1887 CIA REPORT, *supra* note 13, at xxi (quoting 1886 COMM’R OF INDIAN AFFAIRS ANN. REP.). The Commissioner expanded upon the idea of the alleged virtues, from the standpoint of the Indians, of being subjected to various aspects of Anglo-derived civilization in his 1904 annual report. He noted that “[f]ortunately the territory of the United States came under the benign influence of the Anglo-Germanic races, who, cradled in liberty, had some regard for the rights of the wild untutored savages.” 1904 CIA REPORT, *supra* note 56, at 21. This behavior was in marked contrast to that of “the Spaniard:” “Coming from a land where freedom of thought and intellectual independence were unknown, he proceeded to the civilization of the Indian with the lights before him, and with the result that the fair islands of the Gulf were soon decimated of their aboriginal inhabitants.” *Id.*

⁶⁹ 1887 CIA REPORT, *supra* note 13, at xxi (quoting 1886 COMM’R OF INDIAN AFFAIRS ANN. REP.). *See also id.* at xxiii (stating that English, “which is good enough for a white man and a black man, ought to be good enough for the red man”).

⁷⁰ *See id.* at xxiv (quoting an unnamed Indian Service agent).

⁷¹ *See, e.g.,* Jessie W. Cook, The Outlook for the New Indian, Address Before the Department of Indian Education, Charleston, S.C., undated, in 1900 CIA REPORT, *supra* note

was the language ““overwhelmingly spoken by over sixty millions of peoples,”” as opposed to the ““two hundred thousand Indians old enough to talk who use a hundred dialects.””⁷² Teaching Indians this superior language was the first step toward civilization,⁷³ and the education of Indian children in English-speaking schools was expected to “work a revolution in the Indian character and to lift them on to a higher plane of civilization.”⁷⁴ Only English, officials argued, was suitable for civilizing the Indians.⁷⁵

The virtues of English were at times explicitly contrasted with the alleged inferiority of Indian languages, which were referred to as “barbarous.”⁷⁶ These languages were sometimes not even afforded the dignity of being called “languages,” but were instead referred to as “dialects,” in spite of the acknowledgment that most Indian tongues were mutually unintelligible and thus were more properly called languages.⁷⁷ The Indians’ languages were described as having ““limited resources”” and as being ““wholly unadapted to the newer life for which [the Indians] are being prepared.””⁷⁸ One annual report of the Commissioner of Indian Affairs quoted an Indian agent’s statement that the Sioux language was ““very misleading,”” without explanation.⁷⁹ Moreover,

48, at 467–68. Cook stated:

English words stir into being vague ideas, which grow as the child goes to the reservation boarding school, and when away from the reservation he has freedom to go into the families of white people; then, in addition to the knowledge he has gained from books and from the rudiments of trade furnished by the school, comes actual contact, in which he educates as well as receives education, and the public is amazed.

Id.

⁷² 1887 CIA REPORT, *supra* note 13, at xxiv (quoting one of the leading religious weeklies of the time).

⁷³ See, e.g., *id.* at xxiii (“The first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them the English language.”).

⁷⁴ 1891 CIA REPORT, *supra* note 58, at 53.

⁷⁵ See 1887 CIA REPORT, *supra* note 13, at xxiii (“The impracticability, if not impossibility, of civilizing the Indians of this country in any other tongue than our own would seem to be obvious . . .”).

⁷⁶ See, e.g., *id.* at xx (quoting the Report of the Indian Peace Commission); see also *supra* notes 23–24 and accompanying text (discussing the alleged barbarousness of Indian languages).

⁷⁷ See, e.g., 1887 CIA REPORT, *supra* note 13, at xxiv (citing a leading religious weekly of the time); see also *id.* at xxiii (referring to the different dialects of tribes inhabiting the same area).

⁷⁸ *Id.* at xxv (quoting an unnamed religious weekly).

⁷⁹ *Id.* at xxiv (quoting an unnamed Indian Service agent).

officials argued, allowing Indian children to speak their native languages would prevent them from being fluent in English⁸⁰ and would encourage them to adhere to the customs and "inherent superstitions" of their tribes that the government sought to eradicate.⁸¹ From this perspective, literacy in an Indian language was a hindrance to English literacy,⁸² and instruction in Indian languages would be detrimental to the civilization process.⁸³

Given the alleged barbarity and inferiority of Indian languages and the competition that officials believed they offered to English, eradication of Indian languages was a necessary element of the English-only policy.⁸⁴ Thus, government policy was not just to assist Indian students in learning English, but also to eradicate Indian languages; bilingualism was simply not an option. Indian students were punished for speaking their native languages in the classroom or elsewhere,⁸⁵ and it was hoped that their being unable to speak their own

⁸⁰ See *id.* at xxiii ("To teach Indian school children their native tongue is practically to exclude English, and to prevent them from acquiring it."). Officials apparently believed that despite their native languages' alleged inferiority, Indian children would prefer them to English if given a choice.

⁸¹ See *id.* at xxiv (quoting an unnamed Indian Service agent).

⁸² See, e.g., *id.* (quoting an unnamed Indian Service agent and stating that "being able to read and write in the vernacular of the tribe is but little use to them. Nothing can be gained by teaching Indians to read and write in the vernacular, as their literature is limited and much valuable time would be lost in attempting it.").

⁸³ See, e.g., *id.* (quoting an unnamed Indian Service agent and stating that "schools conducted in the vernacular are detrimental to civilization").

⁸⁴ See, e.g., 1889 CIA REPORT, *supra* note 47, at 105 (referring to "the difficult task of breaking up the use of Indian dialects"); 1887 CIA REPORT, *supra* note 13, at xx (quoting the report of the 1868 Peace Commission) (stating that "their barbarous dialect should be blotted out").

⁸⁵ See, e.g., W.N. HAILMANN, REPORT OF THE SUPERINTENDENT OF INDIAN SCHOOLS, Sept. 26, 1896, in 1896 CIA REPORT, *supra* note 48, at 339, 344 (stating that "the great majority of Indian teachers have labored under the delusion that they can hasten the acquisition of the English language . . . by compulsory measures, visiting more or less severe penalties upon the unfortunate children who were caught in the use of the Indian speech"). The 1896 report of Superintendent of Indian Schools W.N. Hailmann, however, raised a dissenting voice to the policy of punishing Indian students for speaking their native languages. See *id.* at 344-45. Hailmann argued that "an idiom that is forced upon a child by means of penalties and other appeals to fear is necessarily hateful to him." *Id.* at 344. Throwing contempt upon an Indian child's native tongue was "manifestly unreasonable," he believed, and would be "pemicious in its perverting and destructive influence upon the child's heart-life." *Id.* The possession of one language would not hinder the acquisition of a new language, Hailmann argued, but would instead facilitate it. See *id.* at 344-45. He concluded that "the unreasonable offensive warfare made in the Indian schools against the Indian vernacular is largely to blame for the apparent stubbornness with which older Indians refuse to learn English or to use the little knowledge thereof which they may possess." *Id.* at 345.

languages without fear of punishment would force them to speak English. Reflecting this approach, Sister Genevieve, the superintendent of St. Mary's Industrial Boarding School at the Devil's Lake Agency in North Dakota, noted in 1890 that "[l]ittle ones like to talk, and prefer speaking English rather than not be allowed to speak at all."⁸⁶ School officials noted that Indian children did not like to speak English in front of each other, but believed that this reticence could be overcome by such techniques as forced public recitations in English.⁸⁷

Officials in Washington were quick to reprimand reservation agents and school authorities who were not complying with the English-only policy. For example, when it was reported in 1884 that in one school instruction was being given in the Dakota language as well as in English, school authorities were informed that only English must be taught, and if Dakota or any other language was taught to the children, they would be removed from the school and government support for the school would be withdrawn.⁸⁸

The Commissioners of Indian Affairs acknowledged from time to time that there were critics of the English-only policy. The Commissioner's 1887 report, for example, noted that much was being said in the press about the prohibition on the teaching of Indian languages in Indian schools.⁸⁹ In response to allegations that the English-only policy "gives a cruel blow to the sacred rights of the Indians," the Commissioner questioned whether the critics of the policy would consider it cruel to force the Indians to give up other practices in which they were alleged to engage:

Is it cruelty to the Indian to force him to give up his scalping-knife and tomahawk? Is it cruelty to force him to abandon the vicious and barbarous sun dance, where he lacerates his flesh, and dances and tortures himself even unto death? Is it cruelty to the Indian to force him to have his daughters educated and married under the laws of the land, instead of selling them at a tender age for a stipulated price into concubinage to gratify the brutal lusts of ignorance and barbarism?⁹⁰

⁸⁶ 1890 CIA REPORT, *supra* note 48, at 29 (report of Sister Genevieve, Superintendent, St. Mary's Industrial Boarding School, undated, *in* report of John H. Waugh, Devil's Lake Agency, Sept. 10, 1890).

⁸⁷ *See, e.g., id.* at 27 (report of Father Jerome Hunt, superintendent of the boys' industrial boarding school at the Devil's Lake Agency, undated, *in* report of John H. Waugh, Devil's Lake Agency, Sept. 10, 1890).

⁸⁸ *See* 1887 CIA REPORT, *supra* note 13, at xxi.

⁸⁹ *See id.* at xxiv (quoting an unnamed Indian Service agent). Some criticism even came from within the government itself. *See supra* note 85 and accompanying text (discussing the views of Superintendent of Indian Schools W.N. Hailmann).

⁹⁰ *See* 1887 CIA REPORT, *supra* note 13, at xxiii–xxiv.

Presumably the reader was expected to acknowledge that it was as appropriate to require Indians to speak only English as it was to require Indians to give up the enumerated practices. The Commissioner took comfort in the "strongest assurance" he had received from "eminent educators and missionaries of their hearty and full concurrence in the propriety and necessity of the [English-only] order."⁹¹ He expected that many who had "assailed the Indian Bureau" for the order would eventually acknowledge that the action was wise.⁹²

Even the staunchest advocates of the English-only policy were willing to allow one exception to the policy: the use of Indian languages was permissible for Christian religious instruction. After the Commissioner of Indian Affairs publicized the English-only policy, concerns were raised about the effect of the English-only policy on Christian proselytization efforts. Religious groups, believing that the policy prohibited the reading of the Bible in Indian languages, sent protests to the President, the Secretary of the Interior, and the Commissioner of Indian Affairs.⁹³ In response to these concerns, the Commissioner made it clear in his 1887 report that the policy "did not touch the question of the preaching of the Gospel in the churches nor in any wise [sic] hamper or hinder the efforts of missionaries to bring the various tribes to a knowledge of the Christian religion."⁹⁴ The Commissioner published a pamphlet that was designed to allay the fears of religious groups about the policy, but the anxiety over the possible applicability of the policy to Christian proselytization efforts was so great that the 1888 Commissioner's report restated the government's position in sweeping language: "[I]t is not the intention of the Indian Bureau to prohibit the reading of the Bible by any Indian in any language, or by anybody to any Indian in any language or in any Indian vernacular, anywhere, at any time."⁹⁵ Thus, where the English-only policy conflicted with government-supported efforts to Christianize the Indians,⁹⁶ the policy had to yield to this other component of the civilization program, and religious instruction in Indian languages was permitted. The use of Indian languages for Christianization purposes was not, however, always as effective as it might have been because of white missionaries' lack of fluency in Indian languages. Thus a missionary who was preaching to Navajo

⁹¹ *Id.* at xxiv.

⁹² *Id.* at xxv (quoting an unnamed religious weekly).

⁹³ See 1888 COMM'R OF INDIAN AFFAIRS ANN. REP. xvii [hereinafter 1888 CIA REPORT].

⁹⁴ 1887 CIA REPORT, *supra* note 13, at xxiii; see also *id.* at xxiv (quoting an unnamed Indian Service agent and stating that "missionaries are at liberty to use the vernacular in religious instructions. This is essential in explaining the precepts of the Christian religion to adult Indians who do not understand English.").

⁹⁵ 1888 CIA REPORT, *supra* note 93, at xvii.

⁹⁶ For a discussion of government-supported efforts to Christianize Indians in the nineteenth century, see Dussias, *supra* note 12, at 776-87.

children did not endear himself to his listeners as he had hoped when instead of addressing them in Navajo as "my dear children," as he had intended, he in fact addressed them as "abalone shells."⁹⁷ Apparently Euro-Americans had at least as much difficulty in learning Indian languages as Indians did in learning English.

3. *Indian Students' Resistance to the English-Only Policy*

The Indian students who were subjected to the English-only policy found themselves being forcibly submerged in a language that was wholly foreign to them. Presumably they experienced the normal difficulties that are encountered by anyone learning a new language, with its own vocabulary, system of speech sounds (phonology), structure of words (morphology), and way of piecing words together (syntax).⁹⁸ Their difficulties were heightened, however, by the vast linguistic gap between their native tongues and English.⁹⁹ The students were not, for example, simply speakers of one European language learning another one, with similar, recognizable linguistic patterns.¹⁰⁰ Instead, they faced a much more daunting task, as David Wallace Adams has described:

[T]he Indian student struggled with a language that was entirely outside his native morphological and syntactical frame of reference. Many Indian languages place little emphasis on time or verb tense; others make little differentiation between nouns and verbs or separate linguistic units; still others build into a

⁹⁷ See COLEMAN, *supra* note 25, at 116 (describing the difficulty encountered by the missionary because of his incorrect pronunciation of Navajo words).

⁹⁸ See DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928*, at 139 (1995).

⁹⁹ See *id.*

¹⁰⁰ For example, in describing the difference between the Navajo language and European languages, Robert W. Young and William Morgan wrote:

The pattern of Navajo thought and linguistic expression is totally unlike that of the European languages with which we are most commonly familiar. We learn such foreign languages as Spanish, French, Italian, and German with a minimum of difficulty because there exist so many analogies, both with respect to grammar and to words, with our own native English. Moreover, the pattern according to which we conceive and express our thoughts in English and in these common European languages is basically the same throughout. We translate readily from one to the other, often almost word for word. And lastly, similar or very closely related sound systems prevailing throughout make the words easy to pronounce and to remember.

ROBERT W. YOUNG & WILLIAM MORGAN, *THE NAVAHO LANGUAGE* 40 (1943), *quoted in* CLYDE KLUCKHOHN & DOROTHEA LEIGHTON, *THE NAVAHO* 254-55 (Doubleday & Co., Inc. rev. ed. 1962) (1946). See also ADAMS, *supra* note 98, at 139 (describing the ability of German- or French-speaking students to recognize similar linguistic patterns in English).

single word thoughts that in English can only be expressed in an entire sentence.¹⁰¹

The students' task was complicated further by the fact that in many schools, students speaking a variety of native languages were grouped together in the classroom, to be taught English by a teacher who spoke none of the languages of the students and who had no knowledge of the different characteristics of these languages.¹⁰²

Another factor contributing to the difficulty faced by Indian students in learning English should have been recognizable to the architects of the English-only policy—the interconnection between language and culture.¹⁰³ Among the reasons given for instituting the English-only policy were the link between language and national character as well as customs,¹⁰⁴ and the link between language and civilization.¹⁰⁵ For Indian students, born into the culture of a particular tribe, learning English involved learning not only a new language, but also a new way of thinking and looking at the world. This was true because, as linguist Edward Sapir has explained, languages are not simply systematic inventories of experiences that are relevant to individuals, but are “self-contained, creative symbolic organization[s], which . . . actually define[] experience for us . . . because of our unconscious projection of [their] implicit expectations into the field of experience.”¹⁰⁶ Contemporary Native Americans also have explained how each language is bound up with its own world view.¹⁰⁷ Thus, Indian students subjected to English immersion programs needed to develop new ways of observing and understanding the world in order to learn

¹⁰¹ ADAMS, *supra* note 98, at 139.

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See supra* notes 51–55 and accompanying text.

¹⁰⁵ *See supra* notes 73–75 and accompanying text.

¹⁰⁶ Edward Sapir, *Conceptual Categories in Primitive Languages*, LXXIV SCIENCE at 578 (1931), *quoted in* KLUCKHOHN & LEIGHTON, *supra* note 100, at 282. Sapir maintained that languages are essentially incommensurable:

Inasmuch as languages differ very widely in their systematization of fundamental concepts, they tend to be only loosely equivalent to each other as symbolic devices and are, as a matter of fact, incommensurable in the sense in which two systems of points in a plane are, on the whole, incommensurable to each other, if they are plotted out with reference to differing systems of coordinates

Id. at 282–84.

¹⁰⁷ *See infra* notes 489–92 and accompanying text (discussing contemporary Native Americans' views on the connection between languages and world views).

English.

The link between a language and the way in which speakers of the language understand the world was explored by anthropologists Clyde Kluckhohn and Dorothea Leighton in their study of Navajo culture. Kluckhohn and Leighton believed that at least some understanding of the Navajo language was necessary in order to try to see the world as it appears to Navajos.¹⁰⁸ They noted that, “[f]rom a psychological point of view, there are as many different worlds upon the earth as there are languages. Each language is an instrument which guides people in observing, in reacting, in expressing themselves in a special way.”¹⁰⁹ Human beings do not feel or report events as a machine would; rather, what they “think and feel, and how they report what they think and feel, is determined [by] . . . the pattern of linguistic habits which people have acquired as members of a particular society.”¹¹⁰ According to Kluckhohn and Leighton, languages reflect the characteristic classes into which different peoples:

pigeonhole their experiences. These classes are established primarily by the language through the types of objects, processes, or qualities which receive special emphasis in the vocabulary and . . . through the types of differentiation or activity which are distinguished in grammatical forms. The language says, as it were, ‘Notice this,’ ‘Always consider this separate from that,’ ‘Such and such things belong together.’¹¹¹

The Navajo language, for example, has sharply defined categories, is extremely literal (focusing on the concrete and the particular as opposed to the abstract), and directs attention to some features of a situation while ignoring others to which the English language directs attention.¹¹² The language reflects Navajo

¹⁰⁸ See KLUCKHOHN & LEIGHTON, *supra* note 100, at 253.

¹⁰⁹ *Id.* at 254; *see also id.* at 271–72 (“Every language has an effect upon what the people who use it see, what they feel, how they think, what they can talk about.”).

¹¹⁰ *Id.* at 271; *see also id.* at 253 (“The forms of each language impose upon its speakers certain positive predispositions and certain negative restrictions as to the meanings they find in their experience.”).

¹¹¹ *Id.* at 271.

¹¹² *See id.* at 272. The Navajo language’s use of categories is exemplified by “the variations in many of its verb stems according to the types of their subjects or objects.” *Id.* The verb stem used often depends upon whether its subject is classified as a long object (such as a pencil), as being granular or a mass (such as sugar), or as something that is bundled up (such as hay), or falls into one of many other categories. *See id.* Its excessive literalness and focus on the particular (as opposed to abstractions) results from the concreteness and specificity of its classification systems. *See id.* at 273. Great exactness of expression can be obtained “by manipulating the wide choice of stems in accord with the multitudinous alternatives offered by fusing prefixes and other separable elements in an almost unlimited number of ways.” *Id.* For

cultural priorities, and the differences in the way of expressing things in English, as opposed to Navajo, reflect "inward differences between two peoples in premises, in basic categories, in training in fundamental sensitivities, and in general view of the world."¹¹³

The connection between language and culture was also apparent in the challenges that Indian students faced in understanding the meaning of words and concepts that had no corresponding equivalents in their own language and culture.¹¹⁴ Frederick Riggs, an Indian school assistant principal who was fluent in Dakota, gave as an example of this problem the difficulty that a Dakota-speaking student would have in making sense of a sentence stating that "Gracie took Zip for a romp in the orchard."¹¹⁵ Although a white child would assume that Zip was a dog, a Santee Sioux student (who would never think of giving a personal name to an animal that might be used to make soup) would not. An orchard, like a pet dog, was also outside the cultural experience of the Sioux student. Riggs claimed that asking the student to make sense of the sentence was like asking a white child to make sense of a sentence in which someone took "Zip for a romp in a glacier."¹¹⁶ Although the Santee student might be able to pronounce the words in the sentence, the student might not fully comprehend its meaning because of a lack of familiarity with the cultural context in which the sentence made sense.¹¹⁷ Thus, the Indian children whom the federal government required, under threat of punishment, to bridge both a linguistic and a cultural gulf in order to learn English were indeed faced with a daunting, and often bewildering, task.

some examples of the specificity and concreteness of Navajo in comparison to English, see *id.* at 274-76. Because their language is so specific, Navajos must take note of distinctions in physical events that English speakers are able to ignore. For example, if a Navajo-speaker and an English-speaker observe a broken wire fence, the English-speaker could simply note, "The fence is broken." The Navajo-speaker would have to decide whether to use a verb indicating that the fence was broken by a human being or that the fence was broken by something that was nonhuman. He might also choose between another pair of verbs that would indicate whether the fence was made of one or several strands of wire. See *id.* at 276.

¹¹³ *Id.* at 293.

¹¹⁴ See ADAMS, *supra* note 98, at 140.

¹¹⁵ *Id.* (citing Frederick B. Riggs, *What Does the Child Bring to the School Intellectually?*, S. WORKMAN, Oct. 1895, at 174; Frederick B. Riggs, *Peculiarities of Indian Education*, S. WORKMAN, Feb. 1901, at 66-71).

¹¹⁶ See ADAMS, *supra* note 98, at 140.

¹¹⁷ See *id.*; see also COLEMAN, *supra* note 25, at 106 (describing how students could pronounce all the words in their readers, but did not know what they meant); *id.* at 109 (discussing the statement of Luther Standing Bear, who after leaving Carlisle Indian School, boasted that his students, unlike the students of white teachers, could understand English words rather than just being able to repeat them).

Some survivors of the English-only policy have written about their experiences, and their recollections provide insight into the effects of this policy on those who were subjected to it. Although these writers may not have expressed themselves in the professional terminology of linguists or anthropologists, their writings make it clear that they were fully aware of the daunting nature of the task that was forced upon them. Ohiyesa (later known as Charles A. Eastman), who attended the Santee Indian School, wrote vividly of the difficulty he experienced in learning to recite English words: "For a whole week we youthful warriors were held up and harassed with words of three letters. Like raspberry bushes in the path, they tore, bled, and sweated us—those little words rat, cat, and so forth—until not a semblance of our native dignity and self-respect was left."¹¹⁸ Luther Standing Bear, who attended Carlisle Indian School, recounted how he was required to stand and read a paragraph eleven times in succession, without any indication from the teacher as to whether he had read it correctly; he felt "cowed and humiliated" for the first time in his life.¹¹⁹ Until Indian students were able to understand at least some English, they were subjected to the frustrating and isolating experience of sitting for hours in a classroom without any idea of what was being said.¹²⁰

In hopes of ensuring that students like Ohiyesa and Luther Standing Bear learned to speak English and abandoned their native languages as quickly as possible, the Bureau of Indian Affairs required not only that all instruction be in English, but also that all conversations between the students be in English.¹²¹ Thus, English was not to be just the *official* language of the schools; it was to be the *only* language of the schools, in order that linguistic control of the students would be complete. Students were to be rebuked or punished for persistent

¹¹⁸ CHARLES A. EASTMAN (OHIYESA), *FROM THE DEEP WOODS TO CIVILIZATION* 46 (Univ. of Neb. Press 1977) (1936). For a brief description of Ohiyesa's life, including his work as a physician and Bureau of Indian Affairs employee, see Raymond Wilson, *Introduction* to CHARLES A. EASTMAN (OHIYESA), *FROM THE DEEP WOODS TO CIVILIZATION* v, v-xii (Univ. of Neb. Press 1977) (1936).

¹¹⁹ See ADAMS, *supra* note 98, at 138 (quoting STANDING BEAR, *LAND OF THE SPOTTED EAGLE* 16–18 (1933)). Standing Bear was later told that he had read the passage perfectly. See *id.* at 139. Students also sometimes felt humiliated if their pronunciation was poor compared to that of other students or if their lack of English competency led to their being required to be in classes with much younger students. See, e.g., COLEMAN, *supra* note 25, at 106.

¹²⁰ See COLEMAN, *supra* note 25, at 106. This kind of experience was probably most difficult for students like Elsie Allen, an early twentieth-century student at the Covelo Boarding School in California who knew no English and whose Pomo dialect was spoken by only one other student at the school. See *id.*

¹²¹ Rules for Indian Schools, in 1890 CIA REPORT, *supra* note 48, VII app. at CLI ("Pupils must be compelled to converse with each other in English . . .").

violations of this rule.¹²² Some school officials encouraged the speaking of English by rewarding students who went for a considerable period of time without speaking their native language.¹²³ Others resorted to corporal punishment, such as teacher Minnie Jenkins, who recounted in her memoirs how she once had thirty-five Mohave kindergartners lie “like little sardines” across tables, and then spanked them for speaking Mohave.¹²⁴ Other punishments included forcing a student to stand still in the school’s public hall or to march around the schoolyard while other children were playing,¹²⁵ and washing a student’s mouth out with soap.¹²⁶ Even misunderstanding of English words might lead to punishment.¹²⁷ For at least some students, however, threats and punishment apparently were not necessary, because they were motivated to learn and exclusively speak English by the desire for the increased status that they had been taught English fluency would give them.¹²⁸

Government and school officials were very much interested in tracking the success of efforts to eradicate Indian languages and replace them with English. In some off-reservation schools, students apparently were able, in a relatively short time, to achieve a reasonable degree of literacy in English, which impressed school visitors.¹²⁹ The efforts of on-reservation schools appear to have been less

¹²² See *id.* (stating that pupils “should be properly rebuked or punished for persistent violation of this rule”).

¹²³ See ADAMS, *supra* note 98, at 140–41. Another tactic was to organize students into military companies with ranks on the basis of their competency in English, and to promote or demote them on the basis of their adherence to the English-only policy. See *id.* at 141.

¹²⁴ See *id.* at 141 (quoting MINNIE BRAITHWAITE JENKINS, GIRL FROM WILLIAMSBURG 320–21 (1951)); see also Reyhner & Eder, *supra* note 15, at 43 (describing the recollection of a Blackfoot student that students were given a stroke of a leather strap with holes in it each time they spoke their native language). Contemporary Native Americans have also written about the corporal punishment to which they or their elders were subjected. See, e.g., *infra* note 542 and accompanying text.

¹²⁵ See COLEMAN, *supra* note 25, at 151–52.

¹²⁶ Contemporary Native Americans have written about how they or their elders were subjected to this punishment. See, e.g., *infra* note 497 and accompanying text.

¹²⁷ See COLEMAN, *supra* note 25, at 107, 150–51 (describing how a student who used the word “ferment” to mean “to work,” and wrote the sentence “I will not ferment in the house,” was sent to the superintendent’s office, apparently to be whipped).

¹²⁸ See *id.* at 107, 154 (describing how some students were motivated by ambition, desire for increased status, and competitiveness).

¹²⁹ See ADAMS, *supra* note 98, at 141. A staff member at the Carlisle Indian School once claimed that the school could teach children aged six to ten to speak and read English within six to nine weeks. See *id.* Officials at the Hampton Normal and Industrial Institute claimed that their students could acquire a “usable” knowledge of English in three years. See *id.* at 141–42.

successful.¹³⁰ Off-reservation schools had an advantage over on-reservation schools in fostering fluency in English in that they were more likely to draw students from more than one tribe, which contributed to the use of English as a common language for speakers of different tribal languages.¹³¹ In addition, off-reservation school students were more likely to come into contact with white communities while at school and were less likely to spend summer vacations with their families, with whom they would revert back to speaking their native languages.¹³²

Despite the government's determination that students should speak only English at all times, some students retained their native languages for use among themselves, outside of the hearing of teachers and school officials.¹³³ The use of native languages by students who were capable of speaking English can be understood as a form of cultural resistance to forced assimilation,¹³⁴ which diluted the effect of the "civilizing" process and, given the links between language, culture, and world views,¹³⁵ helped to perpetuate tribal values and ways of thinking.¹³⁶ Some students also used their native languages to show their displeasure with their educational experience, by such actions as drawing upon their languages' vocabulary for unflattering names for teachers and other school employees, such as the dormitory matron at the Phoenix Indian School whom students referred to as "Ho'ok," the name of a Pima witch.¹³⁷

¹³⁰ See *id.* at 142. Students at on-reservation schools generally used English only in school, and thus were less likely to see the need for it. See *id.*

¹³¹ See *id.* Also, it was easier to enforce the rule against speaking Indian languages when there was no single Indian language that all the students could speak. See *id.*

¹³² See *id.* Under the "outing" program at schools such as Carlisle, students spent the summer months (and sometimes longer periods of time) living and working with white families, rather than returning to their own families during summer vacation. See *id.* at 157. Some students also spent summer vacations away from home because their parents could not afford to pay for their transportation home and back to school in the fall. See, e.g., K. TSIANINA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* 79 (1994). School officials sometimes preferred to keep students at school during the summer, if possible, because of the need for student labor. See, e.g., *id.* at 77-78.

¹³³ See, e.g., COLEMAN, *supra* note 25, at 152 (noting how Navajo students stayed some distance from school authorities, or whispered and covered their mouths, when they wanted to speak Navajo).

¹³⁴ See *id.* at 151.

¹³⁵ See *supra* notes 106-13 and accompanying text.

¹³⁶ See COLEMAN, *supra* note 25, at 152.

¹³⁷ See ADAMS, *supra* note 98, at 233. Giving school employees Indian names was a way that the Indian students, who were regularly given Euro-American names by school officials, could turn the tables. See *id.* at 232; see also *id.* at 108-12 (describing the assigning of names to Indian students).

With some off-reservation school students, however, the efforts to replace Indian languages with English were so successful that students became estranged from their native languages, as the 1908 letter to the home of one student reveals: “My friend and I, both big Pawnees, have fun trying to make a sentence in Indian without saying a word of English. It is hard as well as fun, when you get ninety in English, to make a good sentence in the Pawnee language.”¹³⁸ With some other students, school officials were so effective in convincing them of the inferiority of and wrongfulness of speaking their native languages, that students felt deep shame for any lapses. One Sioux student at Carlisle Indian School wrote to the school superintendent in 1881 to report “with much sorrow” that she had spoken one Sioux word without thinking when another student spoke to her in Sioux, and that she had been so upset that she could not eat her dinner and wept at the dining table.¹³⁹ For government and school officials, these were the success stories—the students who had internalized English as their first language and who were becoming increasingly distanced from their native language and culture. The success with these students began the process of the destruction of many Indian languages—a process that late twentieth-century Native Americans are struggling to reverse.

III. GOVERNMENT TREATMENT OF NATIVE AMERICAN LANGUAGES IN THE TWENTIETH CENTURY

We, the Navajo people, were very fortunate to contribute our language as a code for our country’s victory. For this I strongly recommend we teach our children the language our ancestors were blessed with at the beginning of time. It is very sacred and represents the power of life.¹⁴⁰

In the twentieth century, the federal government’s relationship with Native American languages has differed from one period of time to another. While teachers continued to teach English to students in Indian schools, the federal government also sought to capitalize on the growing obscurity of Native American languages by using them in wartime communications, especially during World War II. When peace returned, however, the government did not repudiate its longstanding hostility toward Native American languages. Only in 1990, with the passage of the NALA, did the government at last demonstrate some respect for Native American languages and understanding of the need to

¹³⁸ INDIAN LEADER, Nov. 13, 1908, at 4, *quoted in* ADAMS, *supra* note 98, at 142.

¹³⁹ See ADAMS, *supra* note 98, at 141 (quoting Letter from Nellie Robertson to Capt. Richard Henry Pratt, *reprinted in* EADLE KEATAH TOH [the Carlisle Indian School newspaper], Jan. 1881, at 4).

¹⁴⁰ S. MCCLAIN, *NAVAJO WEAPON v* (1994) (quoting Kee Etsicitty, a former code talker).

protect them. At the same time, however, competing voices in Congress sought to make English the official language of the United States and its government, thus evincing a continuing hostility toward linguistic diversity that has cast into doubt the seriousness of the commitment to the preservation of Native American languages that the NALA seemed to indicate.

A. *Exploiting Government-Induced Obscurity: The Navajo Code Talkers*

I am bringing a distant nation against you. An ancient and enduring nation.
A people whose language you do not know, whose speech you do not
understand.¹⁴¹

During World War II, Navajo “code talkers,” who conveyed messages in a code developed from the Navajo language, played a crucial role in communications in the South Pacific campaign. This was not, however, the first time that Indians had played such a role in support of U.S. war efforts. During World War I, members of several tribes, including Cheyennes, Choctaws, Comanches, Sioux, and Osages, served as telephone operators, and used of their native languages to transmit messages to baffle German code breakers.¹⁴² During World War II, members of tribes such as the Choctaws,¹⁴³ the Comanches,¹⁴⁴ and the Lakota Sioux¹⁴⁵ used their linguistic skills to transmit undecipherable messages in the European and South Pacific theaters of operations. In spite of the U.S. government’s efforts to eradicate their languages, members of these tribes were willing to lend their languages in the service of the United States’ military goals. For these warriors, words—not the English words that had been forced

¹⁴¹ *Jeremiah* 5:15–16, as quoted by Dennie Hosteen in MCCLAIN, *supra* note 140, at 59.

¹⁴² See THOMAS A. BRITTEN, *AMERICAN INDIANS IN WORLD WAR I: AT HOME AND AT WAR* 106–07 (1997); see also MCCLAIN, *supra* note 140, at 21–22 (describing the role of code talkers, especially Choctaws, in World War I). Indian soldiers also aided communications in World War I by serving as message carriers. See H. Stanton Hill, *Navajo Code Talkers* (Letter), L.A. TIMES, Nov. 20, 1995, at 4 (commenting that Navajos served as radiomen in France in World War I and relayed messages in Navajo).

¹⁴³ See Paul Richardson, *Choctaw Codetalkers Get Honors*, INDIAN COUNTRY TODAY, Apr. 13–20, 1998, at B4 (describing honors given to Choctaw members of the Army Signal Corps for service in Europe).

¹⁴⁴ See MCCLAIN, *supra* note 140, at 23, 97 (describing the role of Comanches in the Army’s Fourth Signal Corps in Europe). Other tribes whose members were involved in World War II Army communications, in addition to the Navajo, include the Cherokee, Hopi, Kiowa, Seminole, and Winnebago tribes. See *The Codetalkers Exhibit* (visited Aug. 21, 1999) <<http://www.nsa.gov:8080/museum/talkers.html>>.

¹⁴⁵ See Kevin Peniska, *Lakota: A Weapon Used in World War II*, INDIAN COUNTRY TODAY, Nov. 10–17, 1997, at B1, B6 (describing the experience of Lakota code talkers in the South Pacific).

upon them in school, but words of their native languages—proved to be their most effective weapons.

In the aftermath of the Japanese attack on Pearl Harbor, several officers in the U.S. Marine Corps began to explore the possibility of using Indian languages as a secure method of communication.¹⁴⁶ At the suggestion of a civilian, the Marine Corps turned to the Navajo language as the possible basis for a code.¹⁴⁷ The apparent obscurity of the language—a condition that government-run and government-funded Indian schools had done their best to achieve—was one of its chief attractions for use in military communications.¹⁴⁸ Following a successful demonstration by four Navajo volunteers of the use of Navajo in the transmission of messages¹⁴⁹ and consultation with the Bureau of Indian Affairs,¹⁵⁰ the Marine Corps approved the recruitment of thirty Navajos for a pilot project.¹⁵¹

At the time the pilot project was approved, more than 4600 Navajos had registered for the draft, but the Selective Service Board had deferred the induction of many Navajos, claiming that, despite their exposure to government schools, they had insufficient education.¹⁵² The recruiters for the pilot project sought Navajos who were fluent in both English and Navajo, but did not tell the potential recruits their plans for the use of the Navajo language.¹⁵³ In May 1942, the first twenty-nine Navajo recruits were taken to boot camp in California.¹⁵⁴

¹⁴⁶ See MCCLAIN, *supra* note 140, at 23. Some of them were aware of the Army's experiments with the use of Comanches in communications in Europe. *See id.*

¹⁴⁷ Civilian Philip Johnston, who had spent time during his childhood on the Navajo Reservation with his Presbyterian missionary parents, submitted a proposal for the use of Navajo. *See id.* at 24–25, 25 app. at 241–45.

¹⁴⁸ Johnston selected the Navajo language in part because of his familiarity with it, and in part because of his erroneous belief that it was not understood by anyone other than Navajos. *See id.* at 25.

¹⁴⁹ *See id.* at 25–28.

¹⁵⁰ *See id.* at 30–32.

¹⁵¹ Letter from Lieutenant Colonel Wethered Woodworth, U.S. Marine Corps, to Director, Division of Recruiting, U.S. Marine Corps (Mar. 26, 1942) in MCCLAIN, *supra* note 140, at 31–33, 31 app. at 247–50.

¹⁵² *See id.* at 31 app. at 248.

¹⁵³ See MCCLAIN, *supra* note 140, at 37–38. Recruits were told only that the recruitment was for “special duty.” *See id.* at 38. The lack of employment opportunities on or near the reservation provided a powerful incentive to join for many of the recruits. *See id.*

¹⁵⁴ *See id.* at 39. For the names of the first recruits, later known as the “First 29,” see *id.* Although the Bureau of Indian Affairs had recommended that the Navajos recruited for their language abilities be trained as a group of specialists, the Marine Corps decided that they should be enlisted for general duty and be subjected to ordinary recruit training in case the experiment with the use of Navajo for military communications proved unsuccessful. *See id.* at

For Navajos who had attended government schools, some of the boot camp routines, such as the strict discipline and marching, proved familiar,¹⁵⁵ and the goals of boot camp, instilling discipline and securing obedience, were indeed similar to those of the Indian schools.¹⁵⁶ The Navajo recruits needed to accustom themselves, however, to being called “Chief,” because many Marines apparently believed it was appropriate to address Navajos, who had never had a traditional chief, by this term.¹⁵⁷ Following completion of boot camp, the twenty-nine “magnificent specimens of ‘original American manhood,’” as their pleased instructors called them, were denied the usual post-boot camp furlough and were sent directly to their new assignment.¹⁵⁸ Thus, like Indian boarding school students who were not allowed to go home for vacations, thus avoiding potential “contamination” from renewed exposure to traditional ways,¹⁵⁹ the Navajo recruits were not given the opportunities to return temporarily to their families that were given routinely to other Marines.

At their first assignment after boot camp, the Navajos were finally told the nature of their assigned task in a classroom—a grim building with barred windows.¹⁶⁰ For at least one of the Navajos, Eugene Crawford, the room was unpleasantly reminiscent of the classrooms of government boarding schools that he had attended, and he later recalled that he “could almost taste the harsh brown soap the teachers had forced him to use to scrub out his mouth when he was caught speaking Navajo.”¹⁶¹ A Marine officer informed the Navajos that the Marine Corps expected them to develop a code based on the Navajo language for use in battle situations, and that the Navajos were expected to develop such a code, and to keep the project secret, upon pain of imprisonment.¹⁶² The

32–33.

¹⁵⁵ See *id.* at 41. Other aspects of boot camp produced culture shock. For example, it was difficult for Navajos, who considered it rude to look someone straight in the eye, to accustom themselves to maintaining the required eye contact with drill instructors. See *id.*

¹⁵⁶ See *id.* at 40.

¹⁵⁷ See *id.* at 43, 134, 169, 180, 217.

¹⁵⁸ See *id.* at 41, 46. From the time they were inducted until the end of the war, the first 29 Navajo recruits were never given leave to go home until they were either wounded or earned 140 points for their service. See *id.* at 46.

¹⁵⁹ See *supra* note 132 and accompanying text.

¹⁶⁰ See MCCLAIN, *supra* note 140, at 49, 50.

¹⁶¹ *Id.* at 50; see also Eric Brazil, *Code Talkers Proud of Wartime Legacy; in World War II, Navajos Used Native Tongue to Radio Military Secrets*, S.F. EXAMINER, Nov. 17, 1995, at A23 (statement of code talker Albert Smith that students were not allowed to use Navajo in boarding school). Code talker Carl Gorman also later recalled being chained for a week to an iron pipe in a school cellar because he had spoken to another student in Navajo. See Blackie Sherrod, *Code Talkers Shouldn't Be Forgotten*, DALLAS MORNING NEWS, Feb. 26, 1998.

¹⁶² See MCCLAIN, *supra* note 140, at 50–51. The Navajos were given four rules to follow

government thus sought to control the Navajos' use of their native language, as it had also sought to do to all students in the Indian schools it ran and supported.¹⁶³

When told of their assignment, some of the Navajos felt that they might not have enlisted in the Marine Corps so eagerly if they had known the nature of the task for which they had been chosen.¹⁶⁴ Many members of the group, in addition to Eugene Crawford, had been punished, sometimes severely, for speaking Navajo in schools established or funded by the same government of which the Marine Corps was a part.¹⁶⁵ Navajo Teddy Draper, Sr., later recalled, "[w]hen I was going to boarding school, the U.S. government told us not to speak Navajo, but during the war, they *wanted* us to speak it!"¹⁶⁶ This government, which in the past had promulgated the English-only policy to eradicate Native American languages and provided for Navajo students to be punished for speaking Navajo, wanted them to now use Navajo to help win a war that it was fighting overseas, far away from Navajo country. In short, the government sought to benefit from the linguistic obscurity of the Navajo language that it had hoped to guarantee through the English-only policy.

Despite whatever misgivings and sense of irony they may have experienced, the twenty-nine Navajos, now free to utilize their language without fear of beatings or other punishments, developed what proved to be the only unbroken oral code in military history.¹⁶⁷ They selected a Navajo word, generally the name of something that was familiar on the Navajo Reservation, for each letter of the English alphabet,¹⁶⁸ thus drawing upon Navajo culture in their work. They made sure that they all pronounced the words in precisely the same way, which was necessary for a language like Navajo in which a slight change in inflection could make a word mean something very different from what the speaker intended.¹⁶⁹

in developing a code: "1. Construct an alphabet. 2. Choose words that are accurate equivalents. 3. Choose short terms for rapid transmission. 4. Memorize all terms." *Id.* at 50.

¹⁶³ See *supra* notes 80–88 and accompanying text (discussing the ban on Indian languages found in the English-only policy).

¹⁶⁴ See MCCLAIN, *supra* note 140, at 50.

¹⁶⁵ See *id.* at 51; see also *supra* note 161 and accompanying text (discussing punishments suffered by Eugene Crawford and Carl Gorman).

¹⁶⁶ KENJI KAWANO, WARRIORS: NAVAJO CODE TALKERS xvi (1990); see also *supra* notes 41–97 and accompanying text (discussing the English-only policy).

¹⁶⁷ See MCCLAIN, *supra* note 140, at 23.

¹⁶⁸ See *id.* at 52. For each letter, the English equivalent of the Navajo word selected for the letter began with the letter in question. For example, the Navajo word "wol-la-chee," meaning "ant," was selected for the letter "A;" "shush," meaning "bear," was selected for "B;" and so on. See *id.*

¹⁶⁹ See *id.*; see also *supra* notes 112–13 and accompanying text (discussing the nature of the Navajo language).

The most difficult work involved assigning Navajo words to military terms and equipment, such as "reconnaissance" and "dive bomber," which did not exist in Navajo.¹⁷⁰ The absence of such words in Indian languages had in the past led some skeptics to believe that these languages were inadequate for military purposes,¹⁷¹ much as some missionaries had believed that Indian languages were inadequate for the transmission of Christianity.¹⁷² The Navajos were able to accomplish this difficult task through the traditional, group-focused behavior that they had been required to put aside in favor of self-centered individualism in boot camp¹⁷³ and in government-run Indian schools.¹⁷⁴ After eight weeks of work, the code contained over 260 terms;¹⁷⁵ it was eventually expanded to include over 500.¹⁷⁶ After successful field tests convinced the Marine Corps of the value of the code and the code talkers in military communications work,¹⁷⁷ a school was established in California to teach the code to other Navajo recruits.¹⁷⁸ Eventually over 350 Navajos served as code talkers.¹⁷⁹

¹⁷⁰ See MCCLAIN, *supra* note 140, at 54–55.

¹⁷¹ See, e.g., *id.* at 23 (discussing the Army's objections to the use of the Comanche language).

¹⁷² See *supra* note 23 and accompanying text (discussing missionaries' opinions of Native American languages).

¹⁷³ See MCCLAIN, *supra* note 140, at 55. This behavior allowed them to work as if they "were one heart, one mind, one voice and one spirit." *Id.*

¹⁷⁴ One of the tasks of Indian education has been described as "individualization." See ADAMS, *supra* note 98, at 22. Educators believed that tribes placed too much emphasis on the community, as opposed to the individual, and that Indian children needed to be taught possessive individualism. See *id.*

¹⁷⁵ See MCCLAIN, *supra* note 140, at 58. For a list of the original terms, see *id.* at 58 app. at 251–59.

¹⁷⁶ See *id.* at 129. The earliest additions to the original code were made in 1942, when additional terms were added to the alphabet for vowels and other frequently used letters. See *id.* at 79. This was done in order to lessen repetitions, which are used to decipher codes. See *id.* at 78. For a list of the terms in the final revised edition of the code, see *id.* at 129 app. at 268–87.

¹⁷⁷ See *id.* at 57. For a description of the field tests, see *id.* at 57–59.

¹⁷⁸ The establishment of the communications school, and the recruitment of the next group of code talkers, which numbered 200 Navajos, is described in *id.* at 77–84. The course at the school, which was located at Camp Pendleton in California, lasted about eight weeks. See *id.* at 79, 125. A field school with a four-week program was later established in Hawaii. See *id.* at 154–55.

¹⁷⁹ The names of 376 known Navajo code talkers are listed in *id.* app. at 288–93. See also KAWANO, *supra* note 166, at 6 (stating that an estimated 375 to 420 individuals served as code talkers); Sherrod, *supra* note 161 (noting that there were 400 code talkers). One of the Marine Corps recruiters of code talkers tried to train three white men, whom he believed to be more intelligent than the Navajos, as code talkers, but their language skills proved to be inadequate. See MCCLAIN, *supra* note 140, at 82–84.

The code talkers proved themselves to be invaluable in the South Pacific campaign and took part in such battles as Guadalcanal, Iwo Jima, and Okinawa.¹⁸⁰ Code talkers were able to transmit in two minutes, messages that could only be sent, deciphered, and replied to via the Marine Corps's code machines in four hours.¹⁸¹ The efficiency and accuracy of the code talkers were such that in units in which code talkers served, all messages that were urgent or secret were given to the code talkers for transmission.¹⁸² By the end of the war, code talkers were assigned to all Marine Corps divisions in the Pacific.¹⁸³

The Marine Corps's recognition of the importance of the code talkers was reflected in the decision to assign them personal bodyguards,¹⁸⁴ who were expected to protect code talkers not only against dangers posed by the Japanese, but also against dangers from fellow Marines who might mistake them for Japanese soldiers. In the eyes of white Marines, their enemies in the South Pacific campaign were distinguishable by their dark hair, dark eyes, and nonwhite skin, and the Navajo Marines shared all of these characteristics¹⁸⁵ and thus did not "look like marines."¹⁸⁶ Although it was difficult for the code talkers

¹⁸⁰ The battles in which code talkers participated, and their roles in those battles, are described in detail in MCCLAIN, *supra* note 140, at 87-213; *see also* KAWANO, *supra* note 166, at 11 (noting that code talkers participated in every Marine assault from Guadalcanal in 1942 to Okinawa in 1945).

¹⁸¹ *See* MCCLAIN, *supra* note 140, at 67-68, 105. One code talker would be given a message in English and send it in the Navajo code, which he had memorized, and the code talker at the other end would receive it in the code and write it down in English. *See id.* at 59, 106. Thus, no time-consuming decoding process was involved; the code talkers were able to do all of the decoding in their heads. The Marine Corps's code, the Shackle code, was the same type of code that was used during the Civil War and required a long and complicated decoding process. *See id.* at 105. The speed and accuracy with which the code talkers could handle transmissions is demonstrated by the fact that during the first 48 hours of the landing on Iwo Jima in 1945, code talkers sent and received over 800 messages without error. *See id.* at 169.

¹⁸² *See id.* at 68, 108.

'The efficiency that the Navajos developed themselves, to write it down immediately and exactly, was something we marveled at When you needed an artillery strike, you want to start it now! You don't want to wait for a complicated code to be broken down, certain parts relayed again, and perhaps not even get it right During combat, anytime that you can get an immediate message and response, you save lives [T]he Navajo code saved lives.'

Id. at 106 (quoting Richard Bonham).

¹⁸³ *See* KAWANO, *supra* note 166, at 11.

¹⁸⁴ *See* MCCLAIN, *supra* note 140, at 89, 103-04, 106-07, 109, 142-43.

¹⁸⁵ *See id.* at 89.

¹⁸⁶ *See, e.g., id.* at 103.

to understand how they could be mistaken for Japanese,¹⁸⁷ there were enough incidents involving mistaken identities for the code talkers to understand the risks posed by their fellow Marines' lack of discernment.¹⁸⁸ Code talkers learned to protect themselves by carrying their radios in front of themselves as a shield¹⁸⁹ and also sent clothing they had worn back to the Navajo Reservation for the performance of protection ceremonies,¹⁹⁰ thus relying on both current technology and traditional religious practices for protection.

One incident indicated that the Japanese themselves sometimes shared the U.S. Marines' confusion over the identity of the Navajos. In 1942, a Navajo named Joe Kieyoomia who had enlisted in the Army was captured by the Japanese, who believed him to be of Japanese ancestry.¹⁹¹ When Kieyoomia's Japanese captors eventually came to understand that he was American Indian, they had him listen to code talker transmissions and tortured him in the vain hope of getting him to reveal the code.¹⁹² Kieyoomia, who recognized Navajo words in the transmissions but could not understand what was being said, later recalled how his language had kept him alive. Hearing Navajo words gave him hope to endure the beatings, and he was not executed by the Japanese because of their desire to break the Navajo code.¹⁹³

In addition to confusing code talkers with the Japanese in combat areas, Marines also sometimes confused intercepted code talker transmissions with Japanese transmissions, believing that the Japanese had managed to break into their radio circuits.¹⁹⁴ Navajo being spoken among the code talkers in the field was also sometimes mistaken for Japanese, putting the Navajos and anyone with them in danger of being shot by nervous fellow Marines.¹⁹⁵ The Marines also feared being attacked at close range by English-speaking Japanese soldiers and

¹⁸⁷ See *id.* at 89, 193.

¹⁸⁸ See *id.* at 89, 103, 104-05, 114-15, 192-93 (describing incidents involving mistaken identity). In the most serious of these incidents, a code talker was killed by a Navy medic. See *id.* at 104-05.

¹⁸⁹ See *id.* at 108. The code talkers were also at greater risk because they were given only M1 rifles or .45 pistols to defend themselves when they were in the field, rather than the Browning Automatic Rifles issued to other Marines. See *id.* at 209.

¹⁹⁰ See *id.* at 110. Navajos who sent clothing home for these ceremonies stated that they could feel when their families were performing the ceremonies for them. See *id.*

¹⁹¹ See *id.* at 119. Kieyoomia was a prisoner of war from April 1942 to September 1945. See *id.* at 120.

¹⁹² See *id.* at 119-20. Kieyoomia surmised that his Japanese captors must have figured out that the unidentifiable talkers whose transmissions they intercepted were Indians. *Id.*

¹⁹³ See *id.* at 120.

¹⁹⁴ See, e.g., *id.* at 58, 171-72.

¹⁹⁵ See, e.g., *id.* at 176-77.

tried to deal with this threat by using passwords that contained *Ls* and *Rs*, which they believed the Japanese could not pronounce properly.¹⁹⁶ Some of the code talkers ultimately had the opportunity to speak the language they were sometimes believed to be speaking during the war, when they participated in the occupation of Japan and were given Japanese language handbooks to assist them in communicating with Japanese citizens.¹⁹⁷ During the occupation, some of the Navajos were asked to make one more use of the code—to send back to the United States encoded reports of the effects of the atomic bombs dropped on Hiroshima and Nagasaki, which U.S. intelligence officials wanted to keep secret.¹⁹⁸

Marine Corps officials praised the Navajo code talkers extensively for their role during the war,¹⁹⁹ but when the code talkers who had survived the war returned home,²⁰⁰ their role in military communications was still secret. Despite some initial misgivings about using their language as a code for the benefit of the U.S. military,²⁰¹ many code talkers had come to be proud that they had been able to make an important contribution to the war effort through their native language, but they could not share their pride with others.²⁰² Like their use of the Navajo language in Indian schools, their use of the Navajo code during the war had to be hidden, even from their families.²⁰³ Subjected to a code of silence, these Navajos were deprived of the sense of release that other veterans enjoyed from being able to talk about their wartime experiences.²⁰⁴ Some of the code talkers instead

¹⁹⁶ See *id.* at 170; see also *id.* at 176 (recounting an incident in which a Marine on a night mission spoke loudly many words with *Ls* in them to alert Marines in the area that he was a Marine rather than a Japanese soldier).

¹⁹⁷ See *id.* at 216–17.

¹⁹⁸ See *id.* at 219. The transmissions were made between midnight and 6:00 a.m. because the intelligence officials did not want anyone else to know what information was being sent. See *id.*

¹⁹⁹ See *id.* at 90, 104, 152–54, 164, 201–03, 208–09, 221–22; see also KAWANO, *supra* note 166, at 9–11.

²⁰⁰ Eleven Navajo code talkers died during the war. See MCCLAIN, *supra* note 140, at 105.

²⁰¹ See *id.*, at 50; see also, *supra* text accompanying note 164 (describing how some code talkers questioned whether they would have been so eager to enlist if they had known what was expected of them).

²⁰² See, e.g., MCCLAIN, *supra* note 140, at 93.

²⁰³ See *id.* at 227. They were subject to the same rule of silence that was applied to them when they first developed the code. See *supra* note 162 and accompanying text (discussing the requirement that the code project be kept secret). Many of the code talkers did not even have an indication on their discharge papers of the capacity in which they had served. See MCCLAIN, *supra* note 140, at 226.

²⁰⁴ See MCCLAIN, *supra* note 140, at 227.

found peace from purification ceremonies and other traditional rituals.²⁰⁵

In addition, despite the praise that the code talkers received for their role during the war,²⁰⁶ once they returned to the Navajo Reservation, the code talkers were subjected to the same kind of bad treatment in border towns that they had received before the war.²⁰⁷ After experiencing a sense of belonging and equality in the Marine Corps because of their deft use of their language,²⁰⁸ they were once again treated as inferiors by English-speaking non-Navajos.

Over twenty years passed before the Navajo code talkers received any public recognition for their role in World War II.²⁰⁹ This recognition encouraged the code talkers to form an organization, the Navajo Code Talkers Association, to educate the public in general and other Navajos in particular about the code talkers' role in World War II.²¹⁰ The Association's logo depicts a shield representing the Navajo language. Commenting on the significance of the shield, code talker Albert Smith explained that "[t]he missionaries told us to forget our shield, but we didn't. . . . It is our spiritual shield."²¹¹ In 1981, the Marine Corps publicly acknowledged for the first time the importance of the Navajo language, and of those who devised and used the code based on it, in the successful outcome of the war in the South Pacific.²¹² In 1982, President Reagan, acting pursuant to a congressional joint resolution, designated August 14 as National Navajo Code Talkers Day, "a day dedicated to all members of the Navajo Nation and to all Native Americans who gave of their special talents and their lives so

²⁰⁵ *See id.*

²⁰⁶ *See, e.g., supra* note 182 (describing praise of the code talkers).

²⁰⁷ *See* MCCLAIN, *supra* note 140, at 229.

²⁰⁸ *See id.* at 228–29. Code talker Kee Etsicity commented that "[t]he Marine Corps is like a wheel with many different spokes. The code talkers were one spoke in the Marine Corps wheel, an important one, but contained within the whole." *Id.* at 229.

²⁰⁹ In 1969, 16 code talkers attended a reunion of the Fourth Marine Division and were given medallions in honor of their service. *See id.* at 230–33. The medallion, for Meritorious Service in Communications, depicted Ira Hayes, a member of the Pima tribe, on horseback and the image of the well-known second flag raising at Mt. Suribachi on Iwo Jima. *See id.* at 231, 233. Hayes participated in the second flag raising, at which code talker Teddy Draper was also present. *See id.* at 180–81. When the flag was raised, the event was reported in Navajo code by Draper. *See id.* at 181; *see also* Brazil, *supra* note 161, at A23.

²¹⁰ *See* MCCLAIN, *supra* note 140, at 233–34. In February 1999, the Navajo Nation honored the code talkers by establishing a Navajo Code Talkers office in the Navajo Museum, Library, and Visitor Center. *See* Brenda Norrell, *Long-Awaited Recognition: Navajo Code Talkers Office Opens on Navajo Nation*, INDIAN COUNTRY TODAY, Feb. 1–8, 1999, at C3.

²¹¹ Brazil, *supra* note 161, at A23 (quoting statement of Albert Smith).

²¹² *See* MCCLAIN, *supra* note 140, at 235. The occasion was the 39th anniversary of the recruitment of the first 29 Navajo code talkers, and the Marine Corps went to the Navajo Reservation to recruit an all-Navajo platoon in their honor. *See id.*

that others might live.”²¹³ The presidential proclamation noted that the Navajos had contributed “a precious commodity”—their language, the coded form of which proved to be “the only foolproof, unbreakable code in the history of warfare.”²¹⁴ The proclamation also recognized the members of the Chippewa, Choctaw, Creek, Sioux, and other tribes who had used their languages as codes during World Wars I and II.²¹⁵

The experience of the Navajo code talkers teaches a number of lessons about the attitudes of twentieth-century federal government policy makers toward Native American languages. Native American languages were no longer always condemned; they were recognized as having some value, at least in a limited context. They were not, however, valued by government officials for their important role in the preservation of the cultures that had developed them. Rather, during wartime their value stemmed from the fact that they were spoken by a relatively small number of people and were virtually unknown outside of the communities in which they were spoken. The English-only policy established in the nineteenth century had helped to ensure this status for Navajo and other Native American languages. Thus, the federal government was able to reap the benefits of a linguistic obscurity that it had helped to create, without any need to address the adverse effects that this obscurity could have on Indians and their cultures.

Once the government’s need for Native American languages and the services of those who spoke them came to an end with the conclusion of World War II, the government was long content to allow Native American languages to sink into even greater obscurity. Moreover, the government even continued its assault on Native American languages by preserving into the 1960s the English-only policy to which code talkers were subjected while students in Indian schools.²¹⁶ The code talkers who had viewed their languages as a shield against loss of identity and assimilation, and had allowed their fellow soldiers to take shelter behind these shields by using them in wartime communications, were also expected to sink into obscurity. Only in the last decade has the federal government begun to recognize the value of the Navajo code talkers’ contribution and of Native American languages in general.

²¹³ Proclamation No. 4954, 47 Fed. Reg. 32,901–02 (1982).

²¹⁴ *Id.* at 32,901.

²¹⁵ *See id.*

²¹⁶ *See* Paul Salopek, *Knowledge, Culture Dying Along with Tribal Tongues; Languages Becoming Extinct at Unprecedented Rate*, DALLAS MORNING NEWS, Mar. 3, 1996, at 6A; *see also* Sascha Brodsky, *Saving Languages: Students Learning to Speak Navajo*, DENV. POST, Oct. 16, 1994, at C02 (noting that students could be punished for speaking Navajo in Bureau of Indian Affairs schools until the 1960s).

B. *Protection of Native American Languages in Congress: The Native American Languages Acts of 1990 and 1992*

The Congress finds that the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages. . . .²¹⁷

1. *The Native American Languages Act of 1990*

In the fall of 1990, over one hundred years after the announcement of the English-only policy by the Commissioner of Indian Affairs,²¹⁸ Congress enacted a statute, NALA,²¹⁹ which at last indicated some appreciation on the part of the federal government of the importance of Native American languages. In enacting NALA, Congress recognized the need to preserve and foster the further development of "the historical, traditional languages spoken by Native Americans,"²²⁰ defined to include Indians, Native Hawaiians, Native Alaskans, and Native American Pacific Islanders.²²¹ NALA appeared to represent a repudiation of past government policies aimed at suppressing and ultimately eradicating the traditional languages of the indigenous peoples of the United States and replacing them with English.²²² The text of NALA identified a

²¹⁷ 25 U.S.C. § 2901, 2901(1) (1994).

²¹⁸ See *supra* notes 42–46 and accompanying text (discussing the policy).

²¹⁹ Native American Languages Act of 1990, Pub. L. No. 101-477, 104 Stat. 1152, 1153 (1990) (codified as amended at 25 U.S.C. §§ 2901–06 (1994)). NALA was part of an act that reauthorized the Tribally Controlled Community College Assistance Act of 1978 and the Navajo Community College Act. See *id.* Technical amendments to NALA in 1996 changed two cross-references in the definition section. See Act of Feb. 12, 1996, Pub. L. No. 104-109, § 11, 110 Stat. 763, 765 (1996) (codified at 25 U.S.C. § 2902 (Supp. III 1997)). Although the focus of this Article is NALA and its potential impact on Native American language rights, the United States is, of course, not the only nation in which the language rights of indigenous peoples and minority groups in general are at issue. For a thorough study of minority language issues under international law and under the domestic law of many nations, see generally FERNAND DE VARENNES, *LANGUAGE, MINORITIES AND HUMAN RIGHTS* (1996).

²²⁰ 25 U.S.C. § 2902(6).

²²¹ See *id.* § 2902(1). The statutory language defined "Native American" as meaning an Indian, Native Hawaiian, or Native American Pacific Islander. See *id.* "Indian" was given the meaning set out in 20 U.S.C. § 7881(4) (1994). See 25 U.S.C. § 2902(2). The definition of Indian found in 20 U.S.C. § 7881(4) includes Alaska Natives (also known as Native Alaskans). See 20 U.S.C. § 7881(4)(D) (1994). NALA defined "Native American Pacific Islander" to mean "any descendent [sic] of the aboriginal people of any island in the Pacific Ocean that is a territory or possession of the United States." 25 U.S.C. § 2902(4).

²²² See *supra* notes 41–97 and accompanying text (discussing the English-only policy).

number of congressional findings supporting its enactment that clearly acknowledged the importance of preserving Native American languages as a critical component of Native American cultures. The findings acknowledged the unique status of Native Americans' cultures and languages²²³ and Native Americans' unique status within the United States, which recognized their distinct cultural and political rights, including the right to continue their separate identities.²²⁴ Accordingly, the United States has a responsibility, Congress recognized, "to act together with Native Americans to ensure the survival of these unique cultures and languages."²²⁵ Native Americans' languages are an integral part of their cultures and identities because they "form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values."²²⁶ The Senate Report on NALA expanded on this idea, stating, "Language is the basis of culture. History, religion, values, feelings, ideas and the way of seeing and interpreting events are expressed and understood through language."²²⁷ Because of their fundamental role in communication, the findings stated, languages "are critical to the survival of cultural and political integrity of any people."²²⁸ Thus, like nineteenth-century federal government officials,²²⁹ as well as contemporary Native American advocates,²³⁰ Congress recognized the interconnectedness of language and culture in NALA. Moreover, Congress recognized, the treatment of Native American languages had an impact on Native American students' educational experiences,²³¹ and thus was related to the United States' interest in encouraging

The Senate Report on NALA noted that "[i]t was once the unwritten policy of the United States government to reprimand children for speaking their own languages in school. They were made to feel like foreigners in their classrooms, and, worse, in their own homelands." S. REP. NO. 101-250, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1840, 1841. As noted above, the government's policy of hostility toward Native American languages in Indian schools was more than just an unwritten policy, contrary to the statement in the report. *See supra* note 42 and accompanying text (quoting the English-only regulation). Also as noted above, Native American languages were indeed sometimes described as foreign languages. *See supra* note 57 and accompanying text.

²²³ *See* 25 U.S.C. § 2901(1).

²²⁴ *See id.* § 2901(2).

²²⁵ *Id.* § 2901(1).

²²⁶ *Id.* § 2901(3).

²²⁷ S. REP. NO. 101-250, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1840, 1841.

²²⁸ 25 U.S.C. § 2901(9).

²²⁹ *See supra* notes 51-55 and accompanying text (discussing government officials' understanding of the links between language and culture).

²³⁰ *See infra* notes 487-92 and accompanying text (discussing contemporary Native Americans' perceptions of the links between language and culture).

²³¹ *See* 25 U.S.C. §§ 2901, 2901(6) ("The Congress finds that . . . there is convincing

the development of the full potential of all U.S. citizens.²³² In the nineteenth century, on the other hand, government officials viewed English as essential to citizenship and Native American languages as inimical to it.²³³

Native American languages were under threat, NALA's congressional findings section acknowledged, in part because they were often treated as being anachronistic.²³⁴ The findings also placed some blame on the federal government for the endangered status of Native American languages, but obscured the nature of the government's past conduct. The findings attributed past acts of suppression and extermination to the lack of a consistent government policy on Native American languages.²³⁵ Of course, as discussed above, in the past there *was* a clear and consistent federal policy on Native American languages—a policy that encouraged their eradication and thus was completely at odds with the policy embraced by NALA.²³⁶ The findings failed to acknowledge, let alone condemn, the damage done by government efforts to eradicate Native American languages. Senator Daniel Inouye, however, acknowledged on the Senate floor that NALA was a formal reversal of the federal government policy that prohibited Indian children from speaking their native languages.²³⁷ Finally, the findings recognized the inconsistency between the acts aimed at suppressing and eradicating Native American languages and cultures and the existing federal policy of self-determination for Native Americans.²³⁸ NALA thus acknowledged the importance of Native Americans' being able to speak their native languages as an element of self-determination.

NALA established a number of policies with respect to Native American languages. Most generally, NALA recognized the importance of the preservation, protection, and promotion of "the rights and freedom of Native

evidence that student achievement and performance, community and school pride, and educational opportunity is [sic] clearly and directly tied to respect for, and support of, the first language of the child or student . . .").

²³² See *id.* §§ 2901, 2901(7) ("The Congress finds that . . . it is clearly in the interests of the United States, individual States, and territories to encourage the full academic and human potential achievements of all students and citizens and to take steps to realize these ends . . .").

²³³ See *supra* note 63 and accompanying text.

²³⁴ See 25 U.S.C. § 2901(4).

²³⁵ See *id.* §§ 2901, 2901(5) ("The Congress finds that . . . there is a lack of clear, comprehensive, and consistent Federal policy on treatment of Native American languages which has often resulted in acts of suppression and extermination of Native American languages and cultures.").

²³⁶ See *supra* notes 84–88 and accompanying text (discussing government efforts to suppress Native American languages).

²³⁷ See 136 CONG. REC. S15,024–25 (daily ed. Oct. 11, 1990) (statement of Sen. Inouye).

²³⁸ See 25 U.S.C. § 2901(8).

Americans to use, practice, and develop Native American languages”²³⁹ as an integral part of Native American cultures. This policy statement echoed the views of Senator Inouye, one of NALA’s sponsors, who stated in the Senate Report on NALA that “[i]f native cultures are to survive and if Native Americans are to become full and productive participants in society, . . . then the United States must do all it can to protect and encourage cultural practices.”²⁴⁰

NALA also included more specific policy statements related to the use of Native American languages in education and government. In a clear reversal of the English-only policy promulgated in the nineteenth century for Indian schools, NALA provided that it is U.S. policy to “encourage and support the use of Native American languages as a medium of instruction”²⁴¹ and to encourage state and local education authorities to work with Native Americans in the implementation of programs designed to put NALA into effect.²⁴² To facilitate the availability of teachers who teach in Native American languages, NALA stated that it is U.S. policy to allow exceptions to teacher certification requirements for federally operated and federally funded programs for instruction in Native American languages when the requirements hinder the employment of qualified teachers who teach in these languages, and to encourage states to do the same.²⁴³ NALA also recognized the right of Indian tribes to use Native American languages as a medium of instruction in all federal government-funded schools.²⁴⁴ Educational institutions were encouraged to include Native American languages in their curricula in the same manner as foreign languages²⁴⁵ and to grant comparable credit for proficiency in Native

²³⁹ 25 U.S.C. § 2903(1) (1994 & Supp. 1997).

²⁴⁰ S. REP. NO. 101-250, at 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1840, 1842.

²⁴¹ 25 U.S.C. § 2903(3). NALA deemed the use of Native American languages as a medium of instruction important to support “Native American language survival, . . . educational opportunity, . . . increased student success and performance, . . . increased student awareness and knowledge of their culture and history, and . . . increased student and community pride.” *Id.*

²⁴² *See id.* §§ 2903, 2903(4) (“It is the policy of the United States to . . . encourage State and local education programs to work with Native American parents, educators, Indian tribes, and other Native American governing bodies in the implementation of programs to put this policy into effect . . .”).

²⁴³ *See id.* § 2903(2).

²⁴⁴ *See id.* §§ 2903, 2903(5) (“It is the policy of the United States to . . . recognize the right of Indian tribes and other Native American governing bodies to use the Native American languages as a medium of instruction in all schools funded by the Secretary of the Interior . . .”).

²⁴⁵ *See id.* §§ 2903, 2903(8). These sections state:

It is the policy of the United States to . . . encourage all institutions of elementary,

American languages.²⁴⁶ Thus, NALA recognized Native American languages as being comparable to foreign languages, as some government officials had done in the nineteenth century, but in NALA this comparison bolstered the teaching of Native American languages rather than being seen as a reason for replacing them with English.²⁴⁷ With regard to the use of languages in government, NALA recognized the right of tribes and other governments to give official status to Native American languages for conducting their business.²⁴⁸

NALA also addressed specifically the right of Native Americans to express themselves publicly in Native American languages, stating that “[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.”²⁴⁹ This is clearly an about-face from the days when Native American children were punished for speaking their native languages in government schools.²⁵⁰ NALA also made it clear, however, that its

secondary and higher education, where appropriate, to include Native American languages in the curriculum in the same manner as foreign languages and to grant proficiency in Native American languages the same full academic credit as proficiency in foreign languages.

Id.

²⁴⁶ See *id.* §§ 2903, 2903(7), 2903(8). Sections 2903 and 2903(7) also addressed use of Native American language proficiency to satisfy language requirements in higher education institutions:

It is the policy of the United States to . . . support the granting of comparable proficiency achieved through course work in a Native American language the same academic credit as comparable proficiency achieved through course work in a foreign language, with recognition of such Native American language proficiency by institutions of higher education as fulfilling foreign language entrance or degree requirements.

Id. §§ 2903, 2903(7).

²⁴⁷ See *supra* notes 57–58 and accompanying text (discussing nineteenth-century officials’ views on the status of Native American languages as foreign languages).

²⁴⁸ See 25 U.S.C. §§ 2903, 2903(6). These sections state:

It is the policy of the United States to . . . fully recognize the inherent right of Indian tribes and other Native American governing bodies, States, territories, and possessions of the United States to take action on, and give official status to, their Native American languages for the purpose of conducting their own business

Id.

²⁴⁹ *Id.* § 2904.

²⁵⁰ See *supra* notes 84–88 and accompanying text (discussing efforts to suppress Native

support for Native American languages did not preclude federal financial support for teaching English to Native Americans.²⁵¹

Finally, NALA provided mechanisms for evaluating compliance with its provisions. It directed the President to cause various federal government officials to evaluate their policies and procedures, in consultation with tribal government officials, traditional leaders, and educators, in order to determine what changes needed to be implemented to bring these policies and procedures into compliance with NALA, and to make recommendations to the President on any amendments needed to bring the laws that they administered into compliance with NALA.²⁵² The President was required to submit to Congress in 1991 a report including recommendations for statutory amendments to achieve compliance with the statute.²⁵³

The passage of NALA appeared to signal a clean break with the past as far as federal government policy toward Native American languages was concerned. The link between Native American languages and Native American culture was acknowledged not in connection with efforts to destroy tribal culture and assimilate Native Americans, as had been the case in the nineteenth century,²⁵⁴ but rather in connection with recognition of Native Americans' cultural and political rights, including their right to maintain a separate identity. NALA's statements in support of the use of Native American languages in education and government, and of the right of Native Americans to use Native American languages in public proceedings, indicated that Congress expected Native American languages to play an important public role, instead of being used in secret as was often the case under the nineteenth-century English-only policy.²⁵⁵ NALA did not, however, propose any specific programs to try to undo the damage done by past efforts to eradicate Native American languages, or to foster the preservation and development of those languages that had survived in spite of the eradication efforts. NALA spoke in terms of broad policies and of encouraging that certain actions be taken, without mandating that anything specific be done. Moreover, it did not provide for any funding to carry out the policies that it established. In short, by enacting NALA, Congress was able to

American languages in schools).

²⁵¹ See 25 U.S.C. § 2906 (1994) ("Nothing in this chapter shall be construed as precluding the use of Federal funds to teach English to Native Americans.").

²⁵² See *id.* § 2905(a) (1994).

²⁵³ See *id.* § 2905(b) (1994). The report was to be submitted within a year of October 30, 1990. See *id.*

²⁵⁴ See *supra* notes 51–55 and accompanying text (discussing nineteenth-century perceptions of the connection between language and culture).

²⁵⁵ See *supra* notes 133–37 and accompanying text (discussing students' secret use of their native languages in the Indian schools).

make some lofty statements with symbolic importance, which were perhaps comforting to legislators who were genuinely concerned about the plight of Native American languages in the wake of government eradication efforts, without requiring that any costly or potentially controversial action be taken in support of those statements.

President George Bush's statement upon signing NALA into law may have given NALA's supporters some additional misgivings about the probable ultimate impact of the statute. President Bush noted that he would treat as advisory rather than mandatory the provision that required the President to submit a report to Congress with recommendations for amendments to existing laws, arguing that the Constitution gave the President power to recommend to Congress whatever he deemed "necessary and expedient."²⁵⁶ He also stated that he construed the provision protecting the rights of Native Americans to use Native American languages in public proceedings as a general policy statement, and not as a conferral of a private right of action.²⁵⁷ This statement later became significant in determining the real impact of NALA when the statute was interpreted by a federal district court in *Office of Hawai'ian Affairs v. Department of Education*.²⁵⁸

2. *The Native American Languages Act of 1992*

In 1992, Congress enacted another statute in support of the preservation of Native American languages. The Native American Languages Act of 1992 (NALA of 1992)²⁵⁹ established a grant program "to ensure the survival and continuing vitality of Native American languages."²⁶⁰ NALA of 1992, which was enacted as an amendment to the Native American Programs Act,²⁶¹ was

²⁵⁶ See Statement on Signing the Bill Reauthorizing Native American Higher Education Assistance, 26 WEEKLY COMP. PRES. DOC. 1703 (Oct. 30, 1990).

²⁵⁷ See *id.*

²⁵⁸ *Office of Hawai'ian Affairs v. Department of Educ.*, 951 F. Supp. 1484 (D. Haw. 1996). See *infra* note 435 and accompanying text (discussing the court's treatment of the presidential signing statement).

²⁵⁹ Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434 (1992) (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (1994)). NALA of 1992 was passed by the Senate on August 5, 1992. See 138 CONG. REC. S11598, S11599 (daily ed. Aug. 5, 1992). An amended version was passed by the House of Representatives on October 2, 1992. See *id.* at H10,836-38 (daily ed. Oct. 2, 1992). The Senate concurred in the House amendment on October 5, 1992. See *id.* at S16,642-43 (daily ed. Oct. 5, 1992). President Bush signed NALA of 1992 into law on October 26, 1992. See Statement on Signing the Native American Languages Act of 1992, 28 WEEKLY COMP. PRES. DOC. 2133 (Oct. 26, 1992).

²⁶⁰ 42 U.S.C. § 2991b-3 (1995).

²⁶¹ See SEN. REP. NO. 102-343, at 3 (1992), reprinted in 1992 U.S.C.C.A.N. 2954, 2954.

intended to be carried out by the Administration for Native Americans in the Department of Health and Human Services.²⁶²

In introducing the bill that later became NALA of 1992 in the Senate,²⁶³ Senator Daniel Inouye noted that the indigenous languages of North America, which are spoken nowhere else, are threatened with extinction, and that Congress had already recognized, by enacting NALA, that Native American languages are an integral part of Native Americans' cultures and identities.²⁶⁴ NALA of 1992 was necessary, Inouye argued, as a means of implementing the policy goals established by NALA.²⁶⁵

The Report of the Senate Select Committee on Indian Affairs on NALA of 1992 noted the federal government's hostility, for most of the past century, toward Native American languages, and quoted the English-only policy as set out in the 1887 report of the Commissioner of Indian Affairs.²⁶⁶ Highlighting the gravity of the threat facing Native American languages, the report stated that only about 155 of the several hundred Native American languages that once existed in the present day United States were still spoken or remembered, and only about 20 of those languages were still spoken by people of all ages.²⁶⁷ Native American languages were spoken in about thirty states.²⁶⁸ Although NALA had been a first step in repudiating past policies toward Native American

The Native American Programs Act was enacted in 1974. *See* Native American Programs Act of 1974, Pub. L. No. 63-644, § 11, §§ 801-14, 88 Stat. 2291, 2323-27 (codified as amended at 42 U.S.C. §§ 2991-2992d (1994)). The Act established the Office of Native American Programs (now known as the Administration for Native Americans), which funds various programs for Native Americans. *See* 42 U.S.C. §§ 2991b, 2991b-2.

²⁶² *See* 42 U.S.C. § 2991b-3(f); *see also id.* § 2991b-2(a) (establishing the Administration for Native Americans, to be headed by the Commissioner of the Administration for Native Americans, in the Department of Health and Human Services).

²⁶³ The original NALA bill, S. 2044, was introduced by Inouye, for himself and seven other sponsors, on November 25, 1991. *See* 137 CONG. REC. S18,086, S18,097 (daily ed. Nov. 25, 1991).

²⁶⁴ *See id.* (statement of Sen. Inouye).

²⁶⁵ *See id.* at S18,098.

²⁶⁶ *See* SEN. REP. NO. 102-343, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2954-55; *see also supra* note 42 and accompanying text (quoting the English-only policy as set out in the 1887 report of the Commissioner of Indian Affairs).

²⁶⁷ *See* SEN. REP. NO. 102-343, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2954-55. According to data provided by linguist Michael Krauss, about 30 of the remaining languages were spoken by all adults, about 60 were spoken by middle-aged adults, and 45 were spoken by the most elderly adults. *See id.*; *see also infra* notes 461-81 and accompanying text (discussing current statistics on Native American languages).

²⁶⁸ *See* SEN. REP. NO. 102-343, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2954-55. Sixteen states had three or more languages, five states had two languages, and nine states had one language. *See id.*

languages, new legislation was needed, the report explained, because NALA had provided a declaration of policy without providing for any appropriations to assist in accomplishing its goals.²⁶⁹ The report also noted that only the Bureau of Indian Affairs had complied with the NALA provision requiring federal agencies to evaluate their policies and provide recommendations for changes needed in existing law to achieve compliance with NALA.²⁷⁰

Speaking in support of NALA of 1992 on the floor of the House of Representatives, Representative Matthew Martinez highlighted the important role that culture and languages play in the well-being and sense of identity of Native Americans.²⁷¹ He discussed the role that education had been expected to play in the government's nineteenth-century assimilation policy and the abuse that Native American children had suffered in schools for speaking their native languages.²⁷² The federal anti-Native American language policy was so successful, he noted, that many Native American languages had been lost, and others might not survive the next century.²⁷³ Thus, Representative Martinez drew attention to past government policy toward Native American languages and the damage that had been done to them. Although NALA had marked a substantial change in policy, there had not been any comprehensive effort to preserve the remaining Native American languages,²⁷⁴ he noted, and the language programs that some tribes had established had been severely hampered by inadequate funding.²⁷⁵

²⁶⁹ See *id.* at 4–5, reprinted in 1992 U.S.C.C.A.N. 2954, 2956. Although a small number of government grants supporting activities related to Native American languages had been made, there was no specific statutory authorization of grants for tribal language survival and revitalization programs. See *id.* at 5, reprinted in 1992 U.S.C.C.A.N. 2954, 2957.

²⁷⁰ See *id.* at 4, reprinted in 1992 U.S.C.C.A.N. 2954, 2956; see also 25 U.S.C. §§ 2905(a)–(b) (1994).

²⁷¹ See 138 CONG. REC. H10836, H10837 (daily ed. Oct. 2, 1992) (statement of Rep. Martinez). He noted that Native American languages “are vital links in the preservation of traditional rites and customs and are fundamental to the identity of native [sic] Americans.” *Id.*

²⁷² See *id.* He described the assimilation efforts and attack on Native American languages as taking place in the early 1900s. See *id.* As discussed above, these efforts were in fact launched in the nineteenth century. See *supra* notes 41–97 and accompanying text (discussing the English-only policy).

²⁷³ See 138 CONG. REC. at H10,837. He noted that only two of Alaska's 20 Native American languages were still being learned by children, and California's indigenous languages were disappearing at a rate of six each year. See *id.*

²⁷⁴ See *id.* He noted further that the small size of the Native American population (less than 1% of the population) had meant that Native Americans had not had the degree of support enjoyed by other ethnic groups in preserving their cultural identities. See *id.*

²⁷⁵ See *id.* He noted that many tribal governments had had to choose between economic and social development because of lack of funding. See *id.*

Representative Ben Nighthorse Campbell, the only Native American member of Congress at the time,²⁷⁶ also voiced support for NALA of 1992.²⁷⁷ Campbell discussed the relationship between Native American languages and the preservation of literature, religion, history, and traditional ways of life, and noted the loss that the United States as a whole would suffer if it were to lose the diversity and history of Indian nations.²⁷⁸ Many of the problems facing Native American communities, such as suicide and alcohol and drug abuse, were related to loss of identity, Representative Campbell explained, and a revival of Native American language programs would be an important step in restoring the true identities of Native American individuals and communities.²⁷⁹

NALA of 1992 provided authority for the awarding of one- to three-year grants²⁸⁰ to tribal governments and Native American organizations to further "the survival and continuing vitality of Native American languages."²⁸¹ Grants can be used for such purposes as establishing community language projects to facilitate the transfer of Native American language skills from older to younger Native Americans; establishing projects to train Native Americans as language teachers, interpreters, or translators; and establishing projects to train Native Americans for participation in television or radio programs broadcast in a Native American language.²⁸² Grants can also be awarded for the production of Native American language teaching materials, for the gathering and analysis of oral testimony to record and preserve a Native American language, or for the purchase of equipment needed for a Native American language project.²⁸³ Grants

²⁷⁶ See *id.* at H10,837-38 (statement of Rep. Campbell). Campbell was elected to the House of Representatives in 1986 and to the Senate in 1992. See *Senator Ben Nighthorse Campbell* (visited Oct. 24, 1999) <<http://www.senate.gov/~campbell/bio.htm>>.

²⁷⁷ See 138 CONG. REC. at H10,838.

²⁷⁸ See *id.* at H10,837-38 ("To lose the diversity and vibrant history of our many Indian nations, is to lose a vital part of the history of this country.").

²⁷⁹ See *id.* at H10,838.

²⁸⁰ See 42 U.S.C. § 2991b-3(e)(2) (1994).

²⁸¹ *Id.* § 2991b-3(a). In order to receive a grant, the applicant must be eligible for financial assistance under the Native American Programs Act. See *id.* (referring to 42 U.S.C. § 2991b(a)). Applicants are also permitted to enter into partnership arrangements with schools, colleges, or universities. See *id.* § 2991b-3(d).

²⁸² See *id.* §§ 2991b-3(b)(1), (2), (4). The list of purposes for which grants may be used is non-exclusive. See *id.* § 2991b-3(b). The most recent notice of availability of financial assistance under NALA of 1992 specifies two categories of grants. See 63 Fed. Reg. 69974, 69976 (1998). Category I grants, called planning grants, are available for the purpose of conducting an assessment of the current status of a language and establishing goals to ensure its survival. See *id.* Category II grants are for the purpose of designing and/or implementing language programs to meet already established goals. See *id.*

²⁸³ See 42 U.S.C. §§ 2991b-3(b)(3), (5), (6).

awarded under NALA of 1992 for a project cannot exceed eighty percent of the cost of the project.²⁸⁴

The statute also provided for the appointment of a panel of experts to make recommendations about the administration of the grant program, review grant applications, and make recommendations for the approval of applications.²⁸⁵ In order to foster the preservation and use of the products of grant projects, copies of the products were to be sent to the Institute of American Indian and Alaska Native Culture and Arts Development, and could also be sent to national and regional repositories of similar materials.²⁸⁶ In recognition of the sovereign authority of tribes over their cultures and languages, however, NALA of 1992 provided that tribes could make a determination not to transmit copies of the product of a project or to restrict the use or redistribution of a product.²⁸⁷

By enacting NALA of 1992, Congress authorized the tangible assistance for the preservation and revitalization of Native American languages that was missing in NALA. The amount of assistance made available pursuant to NALA of 1992, however, has not been large, particularly in light of the number of Native American languages still in existence, the seriousness of the threat of extinction facing many of them, and the fact that their precarious existence is attributable, seemingly in large part, to past actions of the federal government. The original Senate bill for NALA of 1992 provided authorization for five million dollars in funding for fiscal year 1993, and for such sums as were necessary for subsequent fiscal years.²⁸⁸ The amended House version, in which the Senate concurred,²⁸⁹ reduced the amount authorized for fiscal year 1993 to two million dollars, while still authorizing such sums as were necessary for

²⁸⁴ See *id.* § 2991b-3(e)(1). The remaining cost can be provided from any private or non-federal source, and can include certain funds distributed to a tribe by the federal government. See *id.*

²⁸⁵ See *id.* § 2991b-3(f). NALA of 1992 also specified the basic information which should be included in an application. See *id.* § 2991b-3(c).

²⁸⁶ See *id.* § 2991b-3(f)(2)(D)(i). The Institute of American Indian and Alaska Native Culture and Arts Development was authorized to be established by the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act in 1986. See American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act of 1986, Pub. L. No. 99-498, Tit. XV, § 1504, 100 Stat. 1268, 1601 (1986) (codified at 20 U.S.C. § 4411 (1994)). The Institute was established to provide scholarly study of, provide instruction in, and establish degree-granting programs in the various fields of, Indian art and culture. See 20 U.S.C. § 4417(a). The Institute was also charged with developing programs to coordinate the preservation of "evolving forms of Indian art and culture." *Id.* § 4417(c)(3).

²⁸⁷ See 42 U.S.C. § 2991b-3(f)(2)(D)(ii).

²⁸⁸ See 138 CONG. REC. S11598, 11599 (daily ed. Aug. 5, 1992).

²⁸⁹ See *id.* at S16,642-43 (daily ed. Oct. 5, 1992).

subsequent fiscal years.²⁹⁰ Thus, NALA of 1992 provided a small amount of funding for fiscal year 1993 and left the determination of subsequent amounts to the whims of later Congresses, rather than committing specific amounts for the future. As linguist Michael Krauss has noted, the federal government has been willing to spend one million dollars per year per Florida panther to save that species from extinction, while spending only two million dollars per year (and less in some years)²⁹¹ to save all of the endangered Native American languages.²⁹² Moreover, programs related to Native American languages have been excluded from consideration for funding under other statutory provisions that provide financial assistance for programs in support of languages other than English.²⁹³

In summary, NALA and NALA of 1992 symbolized a repudiation of the federal government's past open hostility toward Native American languages. They did not, however, demonstrate a serious and sustained commitment on the part of Congress to attempt to undo the damage to the languages caused by past government policies. While NALA of 1992 at last provided some financial assistance for the preservation of Native American languages, the amount of funding made available has been small, and the requirement that grantees contribute at least twenty percent of the cost of a project has undoubtedly been an obstacle to groups that would like to take advantage of the available funding for a language preservation project but have very little money of their own.²⁹⁴ An

²⁹⁰ See *id.* at H10,836–37 (daily ed. Oct. 2, 1992). Notices issued by the Administration for Native Americans since the enactment of NALA of 1992 have indicated the approximate amounts of financial assistance available for Native American language projects in fiscal years subsequent to fiscal year 1993. See 63 Fed. Reg. 69974, 69974 (1998) (\$2,000,000 for fiscal year 1999); 63 Fed. Reg. 1475, 1475 (1998) (\$2,000,000 for fiscal year 1998); 61 Fed. Reg. 44122, 44131 (1996) (\$1,000,000 for fiscal year 1997); 60 Fed. Reg. 46598, 46608 (1995) (\$1,000,000 for fiscal year 1996); 59 Fed. Reg. 37342, 37350 (1994) (\$1,000,000 for fiscal year 1995); 59 Fed. Reg. 14167, 14169 (1993) (\$1,000,000 for fiscal year 1994).

²⁹¹ See *supra* note 290 (indicating that only approximately \$1,000,000 of funding was available in fiscal years 1994–1997).

²⁹² See James Brooke, *Indians Striving to Save Their Languages*, N.Y. TIMES, Apr. 9, 1998, at A1.

²⁹³ See, e.g., 64 Fed. Reg. 2360, 2360 (1999) (stating that projects focusing on Native American languages are not eligible for federal financial assistance set aside for innovative model programs to establish, improve, or expand elementary and secondary school foreign language study).

²⁹⁴ See 42 U.S.C. § 2991b-3(e) (1994); see also 63 Fed. Reg. 69974, 69975 (1998) (stating that “[g]rantees must provide at least 20 percent of the total approved cost of the project”). In discussing the need for government funding of language preservation programs prior to the passage of NALA of 1992, Representative Campbell noted that some tribes that were interested in establishing such programs were severely hampered by inadequate funding and found themselves in the position of having to choose between economic and social

additional shortcoming of NALA has also become apparent after the decision in *Office of Hawai'ian Affairs v. Department of Education*,²⁹⁵ discussed in Part IV.A below.²⁹⁶

C. A Competing Voice in Congress: English-Only Revisited

Despite their shortcomings, NALA and NALA of 1992 seemed to signal a greater acceptance of linguistic diversity by the government of the United States, at least with respect to Native American languages. At the same time that these statutes were being considered and voted upon in Congress, however, other legislation, aimed at recognizing English as the official language of the United States, was also being considered. Although none of the variants of this English-only, or "official English," legislation has yet been enacted, the enthusiasm with which such proposed legislation has been supported again and again by many members of Congress seems to indicate that the acceptance of linguistic diversity and the respect for Native American languages that NALA and NALA of 1992 appeared to reflect are quite limited.

In describing the need for the English-only policy imposed on Native Americans in the nineteenth century, federal government officials relied on arguments that seem, at first glance, simply to have been a product of the times in which they were made, and therefore to make no sense today. Late twentieth-century Americans, accustomed to a world of globalization, multiculturalism, and multilingualism, in which technology allows for rapid translation of texts and spoken words from their original languages, would find it difficult, one might think, to fully comprehend such concepts as the superiority and transformative power that nineteenth-century government officials and educators attributed to English.²⁹⁷ Nonetheless, many of the specific arguments made in support of the English-only policy in the nineteenth century have been echoed in Congress in connection with proposed English-only legislation. The adage that is suggested by this phenomenon, "plus ça change, plus c'est la même chose,"²⁹⁸ is probably best expressed in its original language, although proponents of English-only legislation might object.

The current English-only movement in Congress dates to 1981, when

development. See *supra* note 275 and accompanying text.

²⁹⁵ *Office of Hawai'ian Affairs v. Department of Educ.*, 951 F. Supp. 1484 (D. Haw. 1996).

²⁹⁶ See *infra* notes 398–459 and accompanying text.

²⁹⁷ See *supra* notes 51–55 and accompanying text (discussing the transformative effect on Native Americans that nineteenth-century officials expected English to have).

²⁹⁸ The expression is most commonly rendered in English as "the more things change, the more they remain the same," although this is not a literal translation of the French words.

Senator S.I. Hayakawa proposed a bill to establish English as the official language of the United States by constitutional amendment.²⁹⁹ Hayakawa also founded a political organization, dubbed "U.S. English," to promote his proposal.³⁰⁰ Since that time, a number of other resolutions to make English the official language of the United States by constitutional amendment have been introduced in both houses of Congress.³⁰¹ The apparent lack of enthusiasm for such a constitutional amendment,³⁰² however, has led to the introduction, since 1990, of a number of bills that include provisions aimed at establishing English as the official language of the federal government by statute.³⁰³ One bill went beyond requiring the use of English in government matters to express a

²⁹⁹ See S.J. Res. 72, 97th Cong. (1981); see also Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 352 (1996) (noting that Hayakawa's proposal was the first such proposal).

³⁰⁰ Wexler, *supra* note 299, at 352 n.287.

³⁰¹ See *id.* at 352 n.286 (listing resolutions for an English language constitutional amendment introduced from 1981 to 1995). An additional House Joint Resolution introduced in 1997, for example, proposed a constitutional amendment with the following language:

Section 1. The English language shall be the official language of the United States. As the official language, the English language shall be used for all public acts including every order, resolution, vote or election, and for all records and judicial proceedings of the Government of the United States and the governments of the several States.

Section 2. The Congress and the States shall enforce this article by appropriate legislation.

H.R.J. Res. 37, 105th Cong. (1997); see also Wexler, *supra* note 299, at 352–57 (discussing amendments proposed to the state and federal constitutions).

³⁰² See Wexler, *supra* note 299, at 352 (noting the lack of enthusiasm for the proposed constitutional amendment).

³⁰³ See, e.g., Declaration of Official Language Act of 1999, H.R. 50, 106th Cong.; Bill Emerson English Language Empowerment Act of 1999, H.R. 123, 106th Cong.; National Language Act of 1997, H.R. 1005, 105th Cong.; Language of Government Act of 1997, S. 323, 105th Cong.; Declaration of Official Language Act of 1997, H.R. 622, 105th Cong.; Bill Emerson English Language Empowerment Act of 1997, H.R. 123, 105th Cong.; English Language Empowerment Act of 1996, H.R. 3898, 104th Cong.; English Language Empowerment Act of 1996, H.R. 3850, 104th Cong.; National Language Act of 1995, H.R. 1005, 104th Cong.; Language of Government Act of 1995, S. 356, 104th Cong.; Declaration of Official Language Act of 1995, H.R. 739, 104th Cong.; Language of Government Act of 1995, S. 175, 104th Cong.; English Language Empowerment Act of 1996, H.R. 123, 104th Cong., (subsequently named the Bill Emerson English Language Empowerment Act of 1996); Language of Government Act of 1995, H.R. 345, 104th Cong.; Language of Government Act of 1993, S. 426, 103d Cong.; Declaration of Official Language Act of 1993, H.R. 739, 103d Cong.; Language of Government Act of 1993, H.R. 123, 103d Cong.; Language of Government Act of 1990, H.R. 4424, 101st Cong.; see also Wexler, *supra* note 299, at 289–90 n.10 (noting that the first such bill was introduced in 1990 and citing several bills).

preference for English in private matters as well, by providing that "English is the preferred language of communication among citizens of the United States."³⁰⁴ Some of the bills also have targeted bilingual education³⁰⁵ and bilingual voting rights³⁰⁶ specifically. Like nineteenth-century educators who required Indian students to use English at all times, on pain of punishment,³⁰⁷ the proponents of such measures apparently have a strong visceral reaction against any form of linguistic diversity in the United States.

In 1996, the House of Representatives passed one of the bills, named the "Bill Emerson English Language Empowerment Act of 1996" (ELEA),³⁰⁸ one

³⁰⁴ H.R. 739 § 2(a). The bill further provided that the federal government was to "promote and support the use of English for communications among United States citizens." *Id.* § 163.

³⁰⁵ See, e.g., H.R. 739, 103d Cong. § 2(c)(1) (1993) (providing for the repeal of Title VII of the Elementary and Secondary Education Act of 1965); H.R. 1005, 105th Cong. § 3 (providing for the repeal of the Bilingual Education Act and the termination of the Department of Education's Office of Bilingual Education and Minority Languages Affairs). See 20 U.S.C. § 7401-91 (1994). The Bilingual Education Act includes a section dealing specifically with bilingual programs for Native American and Native Alaskan children. See *id.* § 7404. Bilingual education was also targeted for elimination in the so-called "English for Children Act" introduced in the House in April 1998. See H.R. 3720, 105th Cong. (1998).

³⁰⁶ See, e.g., H.R. 739, 103d Cong. § 2(c)(2) (1993) (providing for the repeal of section 203 of the Voting Rights Act of 1965); H.R. 123, 3, 104th Cong. § 201 (1996) (providing for the repeal of section 203 and section 4(f) of the Voting Rights Act of 1965); H.R. 3898 at § 201 (providing for the repeal of section 203 and section 4 of the Voting Rights Act of 1965); H.R. 622, 105th Cong. § 3 (1997) (providing for the repeal of section 203 and section 4(f) of the Voting Rights Act of 1965); H.R. 1005, 105th Cong. § 4 (1997) (providing for the repeal of section 203 and section 4(f) of the Voting Rights Act of 1965). Bilingual voting rights were also targeted for elimination by the proposed Bilingual Voting Requirements Repeal Act of 1996. See H.R. 351, 104th Cong. (1996).

³⁰⁷ See *supra* notes 85-86, 122-27 and accompanying text (describing the threats and punishments inflicted on Native American students for speaking English).

³⁰⁸ See H.R. 123, 104th Cong. § 1 (1996); 142 CONG. REC. H9772 (daily ed. Aug. 1, 1996). The name of the bill honored the late Bill Emerson who, as a member of the House of Representatives, was an early sponsor of legislation aimed at making English the official language of the federal government. He proposed the Language of Government Act of 1990, for example. See H.R. 4424, 101st Cong. (1990). The ELEA bill originated as H.R. 123, the Language of Government Act of 1995. See H.R. REP. NO. 104-723, at 1 (1996). Representative Emerson introduced the bill, which was referred to the House Committee on Economic and Educational Opportunities, on January 4, 1995. See *id.* Three other bills dealing with English as the official or common language (Language of Government Act of 1995, H.R. 345, 104th Cong.; Declaration of Official Language Act of 1995, H.R. 739, 104th Cong.; and National Language Act of 1995, H.R. 1005, 104th Cong.) were also referred to the Committee. See *id.* at 4. The Committee ordered ELEA, as amended, favorably reported, by a close vote of 19-17, on July 23, 1996. See *id.* For discussion and criticism of ELEA as reintroduced in the

of its opponents argued that a more accurate name would have been the "Linguistic and Voting Deprivation Act."³⁰⁹ Supported by U.S. English,³¹⁰ the bill declared English the official language of the federal government;³¹¹ imposed an obligation on federal government officials to "preserve and enhance" English's role as the government's official language;³¹² required federal government employees to conduct official business in English;³¹³ provided standing for persons injured by a violation of the statute to bring a civil suit;³¹⁴ required that all naturalization ceremonies be conducted entirely in English;³¹⁵ and repealed bilingual voting requirements in the Voting Rights Act of 1965.³¹⁶ In the House Committee on Economic and Educational Opportunities' report on ELEA and in the debate leading up to the House's passage of the bill, supporters of ELEA raised arguments in favor of making English the sole language of the federal government that were strikingly similar to the arguments made in the nineteenth century by the proponents of the English-only policy for Native Americans.³¹⁷ The congressional findings section of ELEA contained similar sentiments.³¹⁸ Even the very name of the proposed act, with its use of the word "empowerment" in connection with English, suggests that its supporters believed that it would provide the same redemption of a lowly group from weakness and inferiority that proponents of the nineteenth-century English-only policy believed the policy would provide for Native Americans.³¹⁹ By learning English, new immigrants would, ELEA's supporters believed, be raised above their current

House of Representatives in 1997, see generally Lucy Chiu, Note, *The Emerson English Language Empowerment Act: The House's "Straw Man" Bill—A Plea to the Senate Not to Pass the Emerson English Language Empowerment Act of 1997*, 23 J. LEGIS. 231 (1997).

³⁰⁹ See 142 CONG. REC. H9748, H9748 (daily ed. Aug. 1, 1996) (statement of Rep. Velazquez).

³¹⁰ *U.S. English Says Language Lawsuit "Tip of the Iceberg,"* U.S. Newswire, Jan. 21, 1997, available in Westlaw at 1997 WL 5710408. U.S. English was founded by Senator Hayakawa. See *supra* note 300 and accompanying text.

³¹¹ See H.R. 123, 104th Cong. § 102(a) (1996).

³¹² See *id.*

³¹³ See *id.*

³¹⁴ See *id.*

³¹⁵ See *id.*

³¹⁶ See *id.* § 201.

³¹⁷ Compare H.R. REP. NO. 104-723, at 5-10 (1996), and 142 CONG. REC. H9738-72 (daily ed. Aug. 1, 1996) with *supra* notes 51-65 and accompanying text.

³¹⁸ See H.R. 123, 104th Cong. § 101.

³¹⁹ See *supra* notes 59-61, 73-74 and accompanying text (discussing the improved position that officials believed learning English would provide for Native Americans).

presumably low status.³²⁰

ELEA's supporters viewed English as a "powerful tool" that "empowers individuals to become successful members of American society" and "to access the American dream."³²¹ Without English, individuals cannot reach their fullest potential as human beings.³²² ELEA supporters, like the proponents of the English-only policy for Native Americans,³²³ also linked English with economic prosperity. English is the language of commerce³²⁴ and the language of opportunity, particularly economic opportunity,³²⁵ they argued, and is naturally bound up with a good work ethic as a formula for success.³²⁶ Establishing English as the official language of the federal government would, they claimed, put an end to the "linguistic welfare" caused by the lack of an official language.³²⁷

The supporters of ELEA, like nineteenth-century government officials, recognized the link between language and culture, and viewed the learning of English as a necessary part of the absorption of immigrants into American culture and society. English was expected to serve as an important tool of assimilation³²⁸ and integration³²⁹ for immigrants, as it had been intended to be for Native Americans,³³⁰ by bringing them into the mainstream of American

³²⁰ See, e.g., 142 CONG. REC. H9741, H9741 (daily ed. Aug. 1, 1996) (statement of Rep. Goodlatte) (stating that "[w]e want to raise immigrants up").

³²¹ H.R. REP. NO. 104-723, at 6 (1996).

³²² See, e.g., H.R. REP. NO. 104-723, at 5 (1996) (quoting Maria Lopez-Otin); 142 CONG. REC. H9740, H9740 (daily ed. Aug. 1, 1996) (statement of Rep. Sensenbrenner) (stating that ELEA will help immigrants to speak English and thus "achieve their own individual human potential").

³²³ See *supra* notes 60-61 and accompanying text (discussing the English-only proponents' views on the link between English and economic opportunity).

³²⁴ See 142 CONG. REC. H9740, H9740 (daily ed. Aug. 1, 1996) (statement of Rep. Sensenbrenner).

³²⁵ See H.R. 123, 104th Cong. § 101(5) (1996) (stating that "English has historically been . . . the language of opportunity").

³²⁶ See 142 CONG. REC. H9740, H9740 (statement of Rep. Graham).

³²⁷ See H.R. REP. NO. 104-723, at 7 (1996) (quoting Mauro Mujica, Chairman of the Board of U.S. English).

³²⁸ See *id.* at 6; H.R. 123, 104th Cong. § 101(6) (1996) (noting that the purpose of the act is "to help immigrants better assimilate").

³²⁹ See, e.g., 142 CONG. REC. H9739, H9739 (daily ed. Aug. 1, 1996) (statement of Rep. Roukema); *id.* at H9745 (statement of Rep. Porter); see also *id.* at H9758 (statement of Rep. Canady) ("Learning to communicate in English is one of the most important ways in which this coming together, the transformation from the many to one, takes place.").

³³⁰ See *supra* notes 51-55 and accompanying text (discussing the expected role of English in the assimilation of Native Americans).

culture and discouraging "isolation and separatism."³³¹ In other words, English would allow the communication of mainstream American values and ideals to foreigners,³³² and make unity and nationhood possible³³³ by serving as a "common thread" to bind Americans together.³³⁴ Such comments demonstrate the ELEA supporters' apparent desire to equate national unity with uniformity.³³⁵ English is an integral part of what it means to be an American,³³⁶ supporters argued, and prevents what one Representative termed "ethnic enclaves"³³⁷—apparently Indian reservation-like accumulations of suspect non-English speakers. Suggesting deep-seated animosity toward linguistic diversity, as well as ignorance of the history of linguistic diversity in the United States,³³⁸

³³¹ H.R. REP. NO. 104-723, at 6 (1996); *see also* H.R. 123, 104th Cong. § 101(4) (1996) (noting that maintaining a common language would "prevent division along linguistic lines"); 142 CONG. REC. H9743 (daily ed. Aug. 1, 1996) (statement of Rep. Sawyer) (stating, as an opponent of ELEA, that "no element in our culture more fully and deeply defines that culture than our language"); *id.* at 12-13 (reprinting Letter from Steve Robertson, Director, National Legislative Commission, The American Legion, to the Hon. William Goodling, Chairman, House Economic and Educational Opportunities Committee (July 15, 1996)) (stating that English proficiency is "the pathway for joining the mainstream culture of this country").

³³² *See* 142 CONG. REC. H9741, H9741 (daily ed. Aug. 1, 1996) (statement of Rep. Hutchinson).

³³³ *See* H.R. REP. NO. 104-723, at 6 (1996) (arguing that English unites Americans as one nation); *see also* 142 CONG. REC. H9745, H9745 (daily ed. Aug. 1, 1996) (statement of Rep. Porter) (stating that to be a nation we must have English as a common language); *id.* at H9747 (statement of Rep. Johnson) (stating that Americans must be united under English, "our most important common denominator").

³³⁴ *See* H.R. 123, 104th Cong. § 101(3) (1996) (stating that historically a common language, *i.e.*, English, has been a "common thread binding individuals"). In a 1995 speech, then Republican presidential candidate Bob Dole expressed similar sentiments in support of establishing English as the official U.S. language, referring to the need for "the glue of language to help hold us together." David S. Broder, *Dole Urges English Be Official U.S. Tongue: Decries Trend of "Ethnic Separatism,"* B. GLOBE, Sept. 5, 1995, at 1.

³³⁵ *See* Perea, *supra* note 15, at 279 n.33 (quoting William G. Milán, Comment, *Undressing the English Language Amendment*, 60 INT'L J. SOC. LANGUAGE 93, 95 (1986) ("[T]he greatest myth of all is that there is a necessary connection between speaking English and being an American. Equating American nationalism with the 'melting pot' is nothing more than a confusion of the concepts of *unity* and *uniformity*.")).

³³⁶ *See, e.g.*, 142 CONG. REC. H9743, H9743 (daily ed. Aug. 1, 1996) (statement of Rep. Hoke).

³³⁷ *See id.* at H9765 (statement of Rep. Becerra). Representative Becerra opposed the passage of ELEA. *See id.*

³³⁸ *See supra* notes 14-18 and accompanying text (discussing the history of the arrival of French and Spanish, the first European languages in North America, and their continued use in the United States). For a detailed analysis of the history of multilingualism, particularly in French, German, and Spanish, in the United States, *see generally* Perea, *supra* note 15.

supporters indicated that they expected ELEA to save the United States from the dangers they believed were posed by the existence of other languages. As one supporter of ELEA put it, establishing English as the language of the federal government would “strengthen our nationalism” and “stave off the multilingual wedge being driven into the heart of our Nation.”³³⁹ According to the text of the ELEA bill, English is also linked specifically to citizenship, and it would enable immigrants to become “responsible citizens.”³⁴⁰ Similarly, nineteenth-century English-only supporters had argued that Native Americans could not become good citizens unless they spoke English.³⁴¹ Although ELEA supporters seemingly considered speaking English to be a natural prerequisite for U.S. citizenship, ability to speak English was not a requirement for citizenship until the early twentieth century,³⁴² and ability to read and write English were not required until the McCarthy Era, when the Subversive Activities Control Act of 1950 amended the Nationality Act of 1940 to require that applicants for naturalized citizenship be able to read, write, and speak English.³⁴³ Some members of the House expressed the opinion that today’s immigrants were not assimilating as quickly and easily as they believed past immigrants had³⁴⁴ and

³³⁹ 142 CONG. REC. H9745, H9745 (daily ed. Aug. 1, 1996) (statement of Rep. Barrett); *see also id.* at H9739 (statement of Rep. Roukema) (arguing that ELEA is needed to avoid having the United States divided into many “ethnic enclaves”).

³⁴⁰ *See* H.R. 123, 104th Cong. § 101(7) (1996) (stating that English-speaking immigrants will be able to become responsible citizens); *id.* § 102(a) (“It has been the longstanding national belief that full citizenship in the United States requires fluency in English.”).

³⁴¹ *See supra* notes 62–64 and accompanying text.

³⁴² The Naturalization Act of 1906 first imposed the requirement of ability to speak English. *See* Naturalization Act of 1906, ch. 3592, § 8, 34 Stat. 596, 599; *see also* Perea, *supra* note 15, at 337 (discussing the adoption of the requirement).

³⁴³ *See* Subversive Activities Control Act of 1950, ch. 1024, § 30, 64 Stat. 987, 1018 (repealed 1952); *see also* Perea, *supra* note 15, at 337–40 (discussing the adoption of the requirement and the era in which it was adopted). English literacy is still a requirement for naturalized citizenship. *See* 8 U.S.C. § 1423(a)(1) (1994). Some exceptions are made for older individuals who were lawfully admitted as permanent residents and have resided in the United States for specified periods of time. *See id.* § 1423(a)(2).

³⁴⁴ *See, e.g.,* 142 CONG. REC. H9743 (daily ed. Aug. 1, 1996) (statement of Rep. Lipinski) (stating that “[t]hroughout our history, new Americans were proud to learn to speak, read and write English. . . . Yet, today there are more than 32 million Americans who are not proficient in English. In many cities, immigrants can live, work, and play without ever knowing a word of English.”); *id.* at H9762 (statement of Rep. Knollenberg) (claiming that immigrants “aren’t assimilating into our society like our ancestors did”); *id.* at H9764 (statement of Rep. King) (stating that in New York City, he “saw the various ethnic groups come and become absorbed and learn English, become part of the American main stream [*sic*]. But we have gotten away from that in the past 25 years.”). Representative Becerra, however, noted that “studies show that people today are learning English at a rate that is four times as

suggested that the federal government improperly “cater[ed]” to these recalcitrant immigrants by providing programs and services in their native languages.³⁴⁵ ELEA, they apparently hoped, would encourage these immigrants to dissolve into the melting pot more quickly, or would, at the very least, teach them to keep silent if they were unwilling or unable to speak English.

Proponents of ELEA also appealed to precedent to support their position. The House Committee on Economic and Educational Opportunities’ report on ELEA claimed that seventy-nine nations have only one official language³⁴⁶ and that twenty-three states have official English laws.³⁴⁷ Supporters also pointed to the difficulties allegedly attributable to language diversity in countries that did not have a single official language, such as Canada, Belgium, and India.³⁴⁸ These appeals to precedent echoed the arguments of nineteenth-century English-only proponents that other governments had imposed their preferred languages in order to eradicate linguistic diversity within their nations.³⁴⁹

Although ELEA supporters’ attention appeared to be focused on languages spoken by immigrants to the United States, some House members drew their fellow Representatives’ attention to the potential effect of ELEA on Native American languages during the House debate on the ELEA bill. Representative Richardson, for example, noted that one out of every five of his constituents was Native American and that ELEA did nothing to protect endangered Native American languages,³⁵⁰ which, Representative McKinney reminded his colleagues, were here long before English.³⁵¹ Highlighting the potential significance of ELEA, Representative Conyers explained that the constitutional and civil rights of citizens whose first language was not English were at stake, and that statutory minority language assistance provisions had led to increased

fast as people a hundred years ago were learning English.” *Id.* at H9765.

³⁴⁵ See *id.* at H9743 (statement of Rep. Lipinski).

³⁴⁶ See H.R. REP. NO. 104-723, at 10 (1996).

³⁴⁷ See *id.*; see also Peter W. Schroth, *Language and the Law*, 46 AM. J. COMP. L. 17, 17 nn.5-6 (1998) (listing the states that have statutes or state constitutional provisions declaring English to be the official language of the state).

³⁴⁸ See, e.g., 142 CONG. REC. H9740, H9740 (daily ed. Aug. 1, 1996) (statement of Rep. Sensenbrenner) (referring to Canada and Belgium); *id.* at H9741 (statement of Rep. Goodlatte) (referring to Canada and the former Yugoslavia); *id.* at H9748 (statement of Rep. Cunningham) (referring to India).

³⁴⁹ See *supra* notes 65-67 and accompanying text (citing precedents for the English-only policy).

³⁵⁰ See 142 CONG. REC. H9749 (daily ed. Aug. 1, 1996) (statement of Rep. Richardson).

³⁵¹ See *id.* at H9752 (statement of Rep. McKinney); see also *id.* at H9756 (statement of Rep. Williams) (noting that “of these 300 plus so-called foreign languages that we have heard about, almost half of them are native languages, indigenous languages to the original people of the United States, languages that were here hundreds of years before English”).

election participation by Native Americans.³⁵²

Representative Cunningham introduced an amendment to ELEA that addressed the concern of some House members over ELEA's effect on Native American languages and that was designed to except Native American languages from the coverage of ELEA.³⁵³ Cunningham explained that ELEA was not intended to affect Native American languages or hinder their preservation,³⁵⁴ while Representative Underwood noted that the Cunningham amendment was "an affirmation of indigenous languages and their contribution to our society."³⁵⁵

A substitute bill offered by Representative Serrano, named the "English Plus Act,"³⁵⁶ showed an even greater recognition of the potential effects of ELEA on Native American languages. Demonstrating awareness of at least one aspect of the past relationship between the federal government and Native American languages, the Serrano bill referred to the code talkers and the historical role that multilingualism had played in U.S. national security.³⁵⁷ The English Plus Act provided that the federal government should pursue policies that promoted English as a common language,³⁵⁸ but that also, among other goals, "respect[ed] the treaties with and the customs of Native Americans, Native Alaskans, Native Hawaiians, and other peoples indigenous to the United States and its territories."³⁵⁹ Representative Serrano disagreed with the argument that language is the common bond among U.S. citizens, stating that "[d]emocracy—not religious, ethnic, or linguistic uniformity—is what holds this country together."³⁶⁰ The Serrano bill, which showed an appreciation of the benefits of

³⁵² See *id.* at H9752–53 (statement of Rep. Conyers).

³⁵³ See *id.* at H9755 (stating the amendment proposed by Rep. Cunningham). The amendment, when read with the original bill, provided that nothing in ELEA should be construed "to limit the preservation or use of Native American languages." *Id.* Representative Underwood proposed a modification, which the House accepted, to refer to "Native Alaskan or Native American languages (as defined in the Native American Languages Act)." See *id.* at H9756 (stating the modification proposed by Rep. Underwood).

³⁵⁴ See *id.* at H9755 (statement of Rep. Cunningham).

³⁵⁵ *Id.* at H9756 (statement of Rep. Underwood).

³⁵⁶ See *id.* at H9756–57 (reprinting the amendment in the nature of a substitute offered by Rep. Serrano).

³⁵⁷ See *id.* at H9757, § 2(6) of the proposed English Plus Act (stating that multilingualism had "historically been an essential element of national security, including the use of Native American languages in the development of coded communications during World War II, the Korean War, and the Vietnam War").

³⁵⁸ See *id.* (citing section 3 of the English Plus Act).

³⁵⁹ *Id.* (quoting section 3(3) of the English Plus Act).

³⁶⁰ 142 CONG. REC. E1476 (daily ed. Aug. 2, 1996) (comments of Rep. Serrano).

U.S. citizens being able to speak languages in addition to English³⁶¹ which was absent in ELEA, was defeated by a vote of 250 to 178.³⁶²

The House agreed to the Cunningham amendment to except Native American languages from the coverage of ELEA³⁶³ and the bill as amended was passed by a strongly partisan vote of 259 to 169,³⁶⁴ with 223 Republicans voting in favor of the bill and 8 against it, and 160 Democrats voting against the bill and 36 voting in favor of it.³⁶⁵ Ultimately, however, ELEA did not become law because the Senate did not take action on the Senate bill before Congress adjourned.³⁶⁶ Other versions were introduced subsequently in the House and Senate.³⁶⁷

The latest incarnation of ELEA was introduced on January 6, 1999, when Representative Barr introduced the "Bill Emerson English Language Empowerment Act of 1999" (ELEA of 1999) in the House of Representatives.³⁶⁸ The bill was referred to both the House Committee on Education and the Workforce and the House Committee on the Judiciary.³⁶⁹ ELEA of 1999 contained the same provisions for the establishment of English as the official language of the federal government as were contained in ELEA as passed by the House in 1996,³⁷⁰ including language providing that the statute would not be construed "to limit the preservation or use of Native Alaskan or Native American languages."³⁷¹ Unlike ELEA as passed by the House in

³⁶¹ In discussing his bill, Representative Serrano commented that "multilingualism is an asset, not a liability to our competitiveness in our global economy." *Id.*

³⁶² See 142 CONG. REC. H9768 (daily ed. Aug. 1, 1996).

³⁶³ See *id.* at H9756 (noting that the Cunningham amendment, as modified, was passed).

³⁶⁴ See *id.* at H9771-72.

³⁶⁵ See 1995 Bill Tracking Report H.R. 123, available in LEXIS, Genfed Library, BLT104 file.

³⁶⁶ See Lori A. McMullen & Charlene R. Lynde, Comment, *The "Official English" Movement and the Demise of Diversity: The Elimination of Federal Judicial and Statutory Minority Language Rights*, 32 LAND & WATER L. REV. 789, 797 (1997).

³⁶⁷ See, e.g., Bill Emerson English Language Empowerment Act, H.R. 123, 106th Cong. (1999); Declaration of Official Language Act, H.R. 50, 106th Cong. (1999); National Language Act, H.R. 1005, 105th Cong. (1997); Language of Government Act, S. 323, 105th Cong. (1997); Declaration of Official Language Act, H.R. 622, 105th Cong. (1997); Bill Emerson English Language Empowerment Act, H.R. 123, 105th Cong. (1997).

³⁶⁸ See H.R. 123, 106th Cong. (1999).

³⁶⁹ See *id.*

³⁷⁰ Compare *id.* § 3(a) with H.R. 123, 104th Cong. (1996). See also *supra* notes 311-20 and accompanying text (discussing the provisions of ELEA).

³⁷¹ See H.R. 123 106th Cong. § 3(a) (1999).

1996,³⁷² however, ELEA of 1999 did not contain any provisions for the repeal of bilingual voting requirements.

On the same day that ELEA of 1999 was proposed in the House, Representative Stump introduced a bill named the "Declaration of Official Language Act of 1999."³⁷³ The bill establishes English as the official language of the federal government;³⁷⁴ provides that English is the preferred language of communication among U.S. citizens;³⁷⁵ requires the federal government to promote the use of English among citizens and to make all communications in English;³⁷⁶ provides that all citizens should be encouraged to read, write, and speak English;³⁷⁷ requires that the English proficiency standards for citizenship applicants be enforced and that all naturalization ceremonies be entirely in English;³⁷⁸ and provides for civil actions for violations of the statute.³⁷⁹ The statute preempts any inconsistent state or federal law,³⁸⁰ which presumably would include any conflicting provisions of NALA. Other provisions of the bill would repeal parts of Title VII of the Elementary and Secondary Education Act of 1965³⁸¹ and bilingual voting requirements.³⁸² The Declaration of Official Language Act thus goes beyond ELEA of 1999 in several respects,³⁸³ including its preference for English in all communications³⁸⁴ rather than only in the business of the federal government.³⁸⁵ Moreover, unlike ELEA of 1999, there is no exception in the bill for Native American languages.³⁸⁶ As was the case with ELEA of 1999, the bill was referred to both the House Committee on Education and the Workforce and the House Committee on the Judiciary.³⁸⁷

³⁷² See H.R. 123, 104th Cong. § 201 (1996); *see also supra* notes 353–55, 363 and accompanying text (discussing the exception in ELEA for Native American languages).

³⁷³ See H.R. 50, 106th Cong. (1999).

³⁷⁴ See *id.* § 2(a).

³⁷⁵ See *id.*

³⁷⁶ See *id.*

³⁷⁷ See *id.*

³⁷⁸ See *id.*

³⁷⁹ See H.R. 50, 106th Cong. (1999).

³⁸⁰ See *id.*

³⁸¹ See *id.* § 2(c).

³⁸² See *id.* § 3.

³⁸³ Compare H.R. 50, 106th Cong. (1999) with H.R. 123, 106th Cong. (1999).

³⁸⁴ See H.R. 50, 106th Cong. § 2(a) (1999).

³⁸⁵ See H.R. 123, 106th Cong. § 3(a) (1999).

³⁸⁶ See *id.*

³⁸⁷ See *id.*; *see also supra* note 369 and accompanying text (noting the referral of ELEA of 1999 to committee). In the Senate, a proposed resolution was introduced on May 24, 1999 to express the sense of the Senate that the government should pursue policies that encourage

Finally, a concurrent resolution entitled the "English Plus Resolution" was also introduced in the House by Representative Serrano on January 6, 1999.³⁸⁸ Like Representative Serrano's proposed English Plus Act of 1996,³⁸⁹ the proposed resolution specifically mentioned the use of Native American languages in coded communications, as an example of the importance of multilingualism.³⁹⁰ The resolution provided in part that the federal government should pursue policies that not only encourage proficiency in English, by expanding educational opportunity,³⁹¹ but also encourage U.S. residents to learn or maintain skills in other languages,³⁹² and should "assist Native Americans, Native Alaskans, Native Hawaiians, and other peoples indigenous to the United States, in their efforts to prevent the extinction of their languages and cultures."³⁹³ The resolution also cast doubt on the constitutionality of English-only measures.³⁹⁴ The proposed resolution was referred to the Committee on

Americans to master other languages, and particularly Spanish, in addition to mastering English. *See* S. Res. 106, 106th Cong. (1999). The resolution noted that American Indian languages should be preserved and utilized and referred to the role of the Navajo Code Talkers in World War II. *See id.* The resolution was referred to the Committee on Health, Education, Labor, and Pensions. *See id.* The Code Talkers' role and the importance of helping Americans maintain both English and other languages are also mentioned in a section of the proposed Educating America's Children for Tomorrow Act, which was introduced in the Senate and referred to the Committee on Finance on March 18, 1999. *See* S. 677, 106th Cong. § 401 (1999).

³⁸⁸ *See* H.R. Con. Res. 4, 106th Cong. (1999).

³⁸⁹ *See supra* notes 356–62 and accompanying text (discussing the Serrano bill).

³⁹⁰ *See* H.R. Con. Res. 4.

³⁹¹ *See id.* § 1.

³⁹² *See id.* § 2.

³⁹³ *See id.* § 3. Other sections provided that the federal government should continue to provide services in other languages "as needed to facilitate access to essential functions of government, promote public health and safety, ensure due process, promote equal educational opportunity, and protect fundamental rights" and should "recognize the importance of multilingualism to vital American interests and individual rights, and oppose 'English-only' measures and other restrictionist language measures." *Id.* § 4–5.

³⁹⁴ *See id.* For an analysis of the constitutional issues raised by English-only measures, see Perea, *supra* note 15, at 356–71 (arguing that English-only measures violate the Equal Protection Clause). The English Plus Resolution also noted that English-only measures "contradict the spirit of the 1923 Supreme Court case *Meyer v. Nebraska*." *See* H.R. Con. Res. 4. In *Meyer*, the Supreme Court reversed the conviction of an elementary school teacher who had violated a Nebraska statute prohibiting teaching any subject in a language other than English and prohibiting teaching languages other than English to children who had not yet passed the eighth grade. *See Meyer v. Nebraska*, 262 U.S. 390, 403 (1923). The Court considered the statute under the Due Process Clause of the Fourteenth Amendment and concluded that "the statute as applied is arbitrary and without reasonable relation to any end

Education and the Workforce.³⁹⁵

The introduction of ELEA of 1999 and the Declaration of Official English Act in January of 1999 indicates that there is continuing hostility in Congress toward linguistic diversity in the United States. Moreover, these two bills demonstrate that while some members of Congress are willing to at least show more tolerance of Native American languages than of other languages, others are not. While Representative Serrano's English Plus Resolution indicates that at least one member of Congress is supportive of the preservation of Native American (as well as other) languages, the negative reaction to his proposed English Plus Act in 1996³⁹⁶ and the simultaneous introduction of ELEA of 1999 and the Declaration of Official English Act in January 1999 make it difficult to be optimistic about the English Plus Resolution's prospects for success. Thus, in light of this recent activity in Congress, it appears that Native American languages may be no safer from attacks by English-only proponents in late twentieth-century Washington than they were in the nineteenth century.

IV. THE CURRENT STATUS OF THE STRUGGLE FOR THE REVITALIZATION AND PROTECTION OF NATIVE AMERICAN LANGUAGES

Cenedl heb iaith, cenedl heb galon.

A nation without a language [is] a nation without a heart.³⁹⁷

—Welsh proverb

Since the enactment of NALA and NALA of 1992, Native American individuals, tribes, and other groups have endeavored to reverse the effects of past government efforts to eradicate Native American languages and replace them with English. Statistics and anecdotal evidence indicate that although many languages survived, in spite of determined efforts to eradicate them, many of the surviving languages were severely damaged by years of suppression and other

within the competency of the state." *See id.* at 399, 403. The Court commented that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." *Id.* at 401. For an analysis of *Meyer* and the post-World War I nativism and anti-German sentiment that led to the passage of state statutes banning foreign languages in schools, see Perea, *supra* note 15, at 329–32.

³⁹⁵ *See* H.R. Con. Res. 4, 106th Cong. (1999).

³⁹⁶ *See supra* notes 354–62 and accompanying text (discussing the bill and its rejection).

³⁹⁷ David Crystal, *Languages: When the Last Speakers Go, They Take with Them Their History and Culture*, CIVILIZATION, Feb.–Mar. 1997, at 40 (noting and providing a translation of the Welsh proverb). Welsh itself has long been threatened by English, and as of 1997 less than 20% of the population of Wales could speak Welsh. *See id.* at 40. The decline in the number of speakers of Welsh has leveled out during the last twenty years. *See id.* at 44.

forms of discrimination. Groups and individuals have tried a number of tactics, including a federal court suit, in pursuit of the goals of language preservation and revitalization, and have written and spoken eloquently of the need to preserve and revitalize Native American languages.

A. *NALA in Federal Court: Office of Hawai'ian Affairs v. Department of Education*

NALA [merely] sets forth a 'declaration of policy' that it is the policy of the United States to encourage and promote the use of Native American languages [It] does not place an affirmative duty on states³⁹⁸

Until recently, it could be argued that NALA, with its strong statements of support for Native American languages, provided one potential avenue of relief for Native Americans who were seeking to reverse the effects of past discrimination against Native American languages and who believed that government officials were not taking sufficient action to carry out the policy established in NALA. In 1996, a case decided in the federal district court of Hawaii, *Office of Hawai'ian Affairs v. Department of Education*,³⁹⁹ cast considerable doubt on the ability of Native Americans and their allies to use NALA as a weapon in the struggle against past and present discrimination against Native American languages.

In 1995, the Office of Hawai'ian Affairs (the OHA)⁴⁰⁰ filed suit against the Hawaii Department of Education (DOE),⁴⁰¹ contending that the DOE had failed to provide sufficient instruction in the Hawaiian language to students in the state's public schools.⁴⁰² The OHA argued that the DOE should establish more

³⁹⁸ *Office of Hawai'ian Affairs v. Department of Educ.*, 951 F. Supp. 1484, 1494-95 (D. Haw. 1996).

³⁹⁹ 951 F. Supp. 1484 (D. Haw. 1996).

⁴⁰⁰ The Chairman of the OHA and the individual trustees of the OHA were also plaintiffs in the case. *See id.* at 1487. The OHA was created in 1978 by a state constitutional convention to serve Native Hawaiians and to hold title to property set aside or conveyed to it in trust for Native Hawaiians. *See* Elizabeth Pa Martin, *Hawaiian Natives Claims of Sovereignty and Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 273, 280 (1991). The OHA and its chairman and individual trustees are hereinafter referred to collectively as "the OHA."

⁴⁰¹ *See Office of Hawai'ian Affairs*, 951 F. Supp. at 1487. The Superintendent of the DOE, the State of Hawaii Board of Education, and the Chairman and members of the Board were also named as defendants. *See id.*

⁴⁰² *See id.* The case was originally filed in Hawaii state court, but the defendants removed the case to federal court on the basis of federal question jurisdiction. *See id.* The defendants requested the district court to remand the state law claims to state court and grant them partial judgment on the federal law claims. *See id.* at 1488.

Hawaiian language immersion programs because the existing programs failed to meet the needs of Hawaiian students.⁴⁰³ The OHA asserted that the DOE had violated federal law under NALA and under the First and Fourteenth Amendments,⁴⁰⁴ as well as state constitutional law⁴⁰⁵ and statutory law.⁴⁰⁶ The OHA requested that the defendant be required to provide sufficient resources for immersion programs, to devise a plan to expand and increase the accessibility of Hawaiian language programs, and to develop a qualified teacher pool for the programs.⁴⁰⁷ In short, the OHA argued that NALA was intended to provide real relief against government actions that had failed to fully carry out the policies that it established.

The first issue facing the Hawaii district court when it addressed the OHA's claims in 1996 was whether the claim under NALA was barred by the Eleventh Amendment, which generally bars federal court suits against states and state officials in their official capacities.⁴⁰⁸ The court concluded that the State of Hawaii had not waived its Eleventh Amendment immunity⁴⁰⁹ and that Hawaii's immunity had not been abrogated by Congress.⁴¹⁰ As a result, federal court suits

⁴⁰³ See *id.* at 1487.

⁴⁰⁴ See *id.*; see also *infra* notes 415–19 and accompanying text (discussing the federal claims).

⁴⁰⁵ See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1487. The OHA asserted that the DOE had violated Article X, § 4 of the Hawaii State Constitution, "by failing 'to provide a comprehensive Hawaiian education program' and failing to encourage 'community expertise' to develop Hawaiian-language programs and teachers . . ." *Id.* (quoting HAW. CONST. art. IV, § 4).

⁴⁰⁶ See *id.* The OHA asserted that the DOE had violated a state statute "by failing to protect the 'customary rights' of Hawaiians to use their Hawaiian language." *Id.* (citing Haw. Rev. Stat. § 1-1, which sets forth the common law of the State of Hawaii).

⁴⁰⁷ See *id.* at 1489. The resources that the OHA thought were lacking included teachers, classrooms, and teaching materials. See *id.* For a discussion of two Hawaiian immersion schools and the success they have enjoyed, see Cate Montana, *Hawaii's Immersion Schools Become Educational Success*, INDIAN COUNTRY TODAY, July 5–July 12, 1999, at B9.

⁴⁰⁸ See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1490. The Eleventh Amendment provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment has also been held to bar federal court suits against states brought by their own citizens. See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1490 (citing *Papasan v. Allain*, 478 U.S. 265, 276 (1986) and *Shaw v. Cal. Department of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986)).

⁴⁰⁹ See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1490–92.

⁴¹⁰ See *id.* at 1492.

against its agencies were barred by the Eleventh Amendment.⁴¹¹ Although the State of Hawaii itself was not named as a defendant, the court interpreted a suit against its agencies as a suit against the State itself, which was barred in the absence of a waiver or abrogation of immunity.⁴¹² In addition to naming the state agencies as defendants, however, the OHA had also named a number of state officials as defendants in their official capacities.⁴¹³ Suits against these officials under NALA were not barred by the Eleventh Amendment, the court concluded, because of a recognized exception to the amendment for plaintiffs seeking prospective injunctive relief from state officials in order to remedy an alleged present violation of a statute (in this case, NALA).⁴¹⁴ Therefore, having disposed of the claims against the state agencies, the court proceeded to address the merits of the NALA claim against the individual defendants.

The OHA argued that the defendants had restricted Native Hawaiian students' right to express themselves in the Hawaiian language by failing to provide sufficient Hawaiian language immersion programs, and that this failure amounted to a restriction on their right to express themselves in the Hawaiian language that violated NALA.⁴¹⁵ The particular NALA provision at issue was section 2904, which provides that the rights of "Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs."⁴¹⁶ The court noted that Congress had enacted this provision of NALA "in part to articulate its goal of protecting and encouraging the unique language and culture of native populations including the Native Hawaiians."⁴¹⁷ An expert consulted by the OHA explained that the defendants had restricted the use of the Hawaiian language by the following actions:

- (1) failing to open up sufficient slots for more students to participate in the [existing state] immersion program [],
- (2) placing immersion schools in inconvenient and out-of-the-way locations without providing transportation to

⁴¹¹ *See id.*

⁴¹² *See id.* (citing *Pennhurst State School & Hosp. v. Haldermann*, 465 U.S. 89, 100 (1984) and *Shaw v. Cal. Department of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986)).

⁴¹³ *See supra* note 401 (listing all of the defendants).

⁴¹⁴ *See Office of Hawai'ian Affairs*, 951 F. Supp. at 1493 (citing *Ex parte Young*, 209 U.S. 123, 125 (1908)). The prospective relief that the plaintiff sought was the establishment of more Hawaiian language immersion programs. *See id.*

⁴¹⁵ *See id.*

⁴¹⁶ 25 U.S.C. § 2904 (1994).

⁴¹⁷ *Office of Hawai'ian Affairs*, 951 F. Supp. at 1493. For discussion of the reasons for the enactment of NALA, see also *supra* notes 220–38 and accompanying text.

those schools, (3) valuing teachers with DOE certification over those with Hawaiian language skills, and (4) failing to promise a continued State commitment to immersion programs so that parents will be encouraged to place their children in these programs.⁴¹⁸

In short, the OHA argued that the measures taken by the defendants were not sufficient to guarantee the right of Native Hawaiian students to express themselves in the Hawaiian language in the setting of publicly supported education programs. The educational setting was, of course, one in which past Native American students had suffered greatly from the suppression of their native languages.⁴¹⁹

The first (and, as it turned out, the final) issue that the court addressed with respect to NALA was whether NALA created a private cause of action that would allow the OHA to bring suit for violation of its provisions.⁴²⁰ The statute does not explicitly provide for a private cause of action,⁴²¹ but the OHA argued that NALA created an *implied* private cause of action for members of the class that was protected under the statute, such as Native Hawaiians.⁴²² The Hawaii federal district court was the first court to address this issue.⁴²³ Thus, the first case involving the use of NALA to redress language discrimination arose in a state that was not part of the United States at the time that the federal government's English-only policy was established—a policy which caused much of the damage that ultimately led to the enactment of NALA.⁴²⁴ The Native Hawaiian population, however, had been subjected in the past to prohibitions on the speaking of the Hawaiian language on school grounds.⁴²⁵ After the U.S.-supported overthrow of the Kingdom of Hawaii in 1893,⁴²⁶ Hawaiian language-based schools were banned, and until 1986, use of Hawaiian as a medium of

⁴¹⁸ *Office of Hawai'ian Affairs*, 951 F. Supp. at 1494 (summarizing the views of the OHA's expert, identified as Dr. Wilson).

⁴¹⁹ See *supra* notes 84–87 and accompanying text (describing efforts to suppress Native American languages in schools).

⁴²⁰ See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1493.

⁴²¹ See *supra* notes 239–53 and accompanying text (discussing the provisions of NALA).

⁴²² See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1493.

⁴²³ See *id.* (noting that this was an issue of first impression).

⁴²⁴ Hawaii became a state in 1959. See An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959).

⁴²⁵ See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1499 (describing the Hawaiian language prohibition that began in 1896).

⁴²⁶ See 20 U.S.C. § 7902(5) (West Supp. 1999). For additional discussion of the history of Hawaii, see Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. at 77–80 (1991).

education in public schools was illegal.⁴²⁷

The court analyzed the issue of whether NALA impliedly created a private cause of action using the four factors enumerated by the Supreme Court in a 1975 case, *Cort v. Ash*:

(1) is the plaintiff in the special class which the statute intended to protect; (2) is there legislative intent to create a private cause of action; (3) is a private cause of action consistent with the purpose of the legislative scheme; and (4) is the cause of action traditionally relegated to state law, in which case it would be inappropriate to infer a federal cause of action.⁴²⁸

The most important of these factors, the court maintained, was the second factor, which focused on legislative intent.⁴²⁹

The court concluded that Congress did not intend to create a direct private cause of action against the states for violations of NALA.⁴³⁰ Although the OHA represented a subset of individuals who were in the class that NALA intended to protect (the first factor in the *Cort v. Ash* analysis),⁴³¹ the court believed that there was no indication that Congress intended these individuals (or any others) to have a private cause of action under NALA.⁴³² Even though the Supreme Court had established that ambiguities in statutes were to be construed in favor of Native Americans,⁴³³ the court concluded that there were no ambiguities within NALA (aside from the statute's failure to discuss private causes of action) from which a private cause of action might be inferred.⁴³⁴

The court examined what it referred to as the "legislative history" of NALA, but curiously it focused on action by the Executive rather than by Congress. The court found it important that when President Bush signed NALA into law, he commented that he construed NALA "as a statement of general policy and [did] not understand it to confer a private right of action on any individual or

⁴²⁷ See 20 U.S.C. § 7902(19) (1994).

⁴²⁸ *Office of Hawai'ian Affairs*, 951 F. Supp. at 1494 (citing *Cort v. Ash*, 422 U.S. 66, 77-79 (1975)).

⁴²⁹ See *id.*

⁴³⁰ See *id.* The court also concluded that the plaintiff had no enforceable rights under 42 U.S.C. § 1983. See *id.* at 1498; see also *infra* notes 444-48 and accompanying text (discussing the Section 1983 claim).

⁴³¹ See *Office of Hawai'ian Affairs*, 951 F. Supp. at 1484.

⁴³² See *id.* at 1494.

⁴³³ See *id.* at 1494 (citing *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986)).

⁴³⁴ See *id.*

group.”⁴³⁵ While this statement clearly expressed President Bush’s opinion on whether NALA created a private cause of action, it said nothing about Congress’ intent with respect to the issue. The court admitted that the congressional legislative history was silent on the issue, but noted that the legislative history discussed NALA as “necessary . . . to articulate a ‘policy’ of the United States and to serve as ‘an acknowledgment that indigenous Americans have a right to practice their cultures and choose their own lifestyles.’”⁴³⁶

The court treated NALA as merely a statement of general policy goals⁴³⁷ and pointed out that it created no new regulations that could lead to enforcement through suits brought by private citizens.⁴³⁸ As interpreted by the court, the only section of NALA that might require the states to take affirmative steps to carry out the policy of protecting Native American languages was section 2904, which prohibited restrictions on the right of Native Americans to use native languages in public proceedings.⁴³⁹ Furthermore, it was unclear to the court whether this provision extended beyond federally funded education programs to also encompass state public education programs.⁴⁴⁰ The court went on to assert that, even if state programs fell within the provision, it did not place any affirmative duty on Hawaii to promote the Hawaiian language by funding immersion programs, but rather it “at most . . . prevent[ed] the state from barring the use of Hawaiian languages in school.”⁴⁴¹ The court determined that other provisions of NALA also failed to impose any affirmative duties on the states, but rather simply demonstrated a federal policy to encourage state support of Native American languages.⁴⁴² Apart from section 2904, the other provisions of NALA

⁴³⁵ *Id.* (quoting Indian Education Programs: Native American Languages Act, Pub. L. No. 101-477, 1990 U.S.C.A.N. (104 Stat. 1152) 1849).

⁴³⁶ *Id.* (quoting Indian Education Programs: Native American Languages Act, Pub. L. No. 101-477, 1990 U.S.C.A.N. (104 Stat. 1152) 1840). President Reagan began the practice of using presidential signing statements to convey his interpretation of laws, and President Bush continued this new practice. See Kristy L. Carroll, Comment, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV., Winter 1997, at 475, 477 (1997). This practice of issuing interpretive signing statements “transformed this largely ceremonial practice into an overtly political maneuver . . .” *Id.*

⁴³⁷ See *Office of Hawai’ian Affairs*, 951 F. Supp. at 1494.

⁴³⁸ See *id.*

⁴³⁹ See *id.* at 1495; see also *supra* notes 416–17 and accompanying text (discussing 25 U.S.C. § 2904 (1994 & West Supp. 1999)).

⁴⁴⁰ See *Office of Hawai’ian Affairs*, 951 F. Supp. at 1495.

⁴⁴¹ *Id.*

⁴⁴² See *id.* at 1495. The court concluded that the following provisions of NALA did not create any affirmative duties for the states and therefore did not support a private cause of action against a state: the provision declaring that it is U.S. policy to allow exceptions to

that created affirmative obligations applied, on their face, only to the federal government. The court rejected the OHA's argument that these federal obligations should be applied to the state of Hawaii because the state's relationship with Native Hawaiians was akin to the special relationship that the federal government had with Indians.⁴⁴³

Having concluded that NALA did not provide the OHA with a private cause of action against the defendants, the court next considered whether the OHA could sue for violations of NALA under 42 U.S.C. § 1983,⁴⁴⁴ which, the court explained, "provides a vehicle for enforcing rights even where the allegedly violated statute does not provide a direct private cause of action."⁴⁴⁵ The court concluded that the OHA's claims were not enforceable under section 1983.⁴⁴⁶ NALA did not unambiguously confer an enforceable right to sue under section 1983 and thus fell into a judicially created exception to section 1983.⁴⁴⁷ Finally, the court rejected the OHA's federal constitutional claims brought under section

teacher certification programs for federal education programs and encouraging states to do the same; the provision encouraging state and local education programs to work with Native American parents, teachers, tribes, and other governing bodies to implement programs to put the NALA policies into effect; and the provision stating the general policy of encouraging educational institutions to include Native American languages in the curriculum in the same manner as foreign languages. *See id.* (citing 29 U.S.C. §§ 2903(2), 2903(4), 2903(8)).

⁴⁴³ *See Office of Hawai'ian Affairs*, 951 F. Supp. at 1495–96 (discussing the relationship between Hawaii and the Native Hawaiians and the origins of the state's duty to Native Hawaiians). The court stated that the special relationship between the state and Native Hawaiians was associated with the former's role in administering Hawaiian trust lands, and was not necessarily as extensive as the relationship between the federal government and Native Americans. *See id.* at 1495.

⁴⁴⁴ *See* 42 U.S.C. § 1983 (1994 & Supp. 1999). The provision reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

⁴⁴⁵ *Office of Hawai'ian Affairs*, 951 F. Supp. at 1497 (citing *Maine v. Thiboutot*, 488 U.S. 1, 8 (1980), which held that there was a valid section 1983 claim despite the lack of a private cause of action under the Social Security Act).

⁴⁴⁶ *See id.* at 1498.

⁴⁴⁷ *See id.* at 1497; *see also id.* at 1497–98 (analyzing the OHA's section 1983 claim).

1983 on Eleventh Amendment grounds.⁴⁴⁸ It remanded the OHA's state law claims to state court.⁴⁴⁹

The court's decision rejected the OHA's attempt to utilize NALA as a tool to aid Native Americans in their longstanding, congressionally supported struggle to preserve and protect their languages against continuing assimilationist pressures, and to undo the lingering effects of past language eradication efforts. NALA was revealed to have not provided a basis for relief for individuals who were aggrieved by government failures to honor the policies NALA purported to establish because of its failure to provide for a private cause of action for enforcement of its provisions. The lack of such a provision stands in marked contrast to ELEA, which was passed by the House in 1996, and one of the most recent English-only bills, the Declaration of Official Language Act of 1999, both of which provide explicitly for civil actions for violations of their provisions.⁴⁵⁰ The court's approach thus left NALA as merely a lofty statement offering no concrete relief for the victims of generations of language discrimination and eradication efforts.

The court's approach to NALA calls to mind the U.S. Supreme Court's approach to the interpretation of another federal statute that purportedly was enacted to guarantee to Native Americans rights that historically had been trampled upon by the federal government. In 1988, in *Lyng v. Northwest Indian Cemetery Protective Association*,⁴⁵¹ the Supreme Court addressed free exercise claims related to the U.S. Forest Service's plans to complete logging roads and allow timber harvesting in a California national forest that encompassed an area

⁴⁴⁸ See *id.* at 1501. §The plaintiffs had alleged violations of First and Fourteenth Amendment rights based on the state's past discrimination against the use of the Native Hawaiian language in the state's public schools. See *id.* at 1499. The court explained that the Eleventh Amendment did not bar suits against state officials for declaratory or prospective relief. See *id.* at 1498. The plaintiffs described how, beginning in 1896, Hawaiian law prohibited students from speaking the Hawaiian language on school grounds and argued that although this discrimination had ceased, the injunctive relief they sought was prospective rather than retrospective because Hawaii had a present constitutional duty to ameliorate the lingering effects of past discrimination. See *id.* at 1499. The ongoing effects of past discrimination included the following: "lower SAT scores, lower percentage representation in the gifted and talented programs in schools, and over-representation of students in programs for learning disabilities." *Id.* at 1501. The court concluded that the plaintiffs were seeking retrospective relief and therefore their constitutional claims did not fall into the Eleventh Amendment exception for prospective relief and were barred. See *id.* at 1501.

⁴⁴⁹ See *id.* at 1501. The court explained that the Eleventh Amendment barred it from exercising jurisdiction over state law claims against Hawaii. See *id.* For a description of the state law claims, see *supra* notes 405–06.

⁴⁵⁰ See H.R. 123, 104th Cong. § 164 (1996); H.R. 50, 106th Cong. § 169(a) (1999).

⁴⁵¹ 485 U.S. 439 (1988).

that was sacred to the Yurok, Karok, and Tolowa Tribes.⁴⁵² In addition to analyzing and rejecting the plaintiffs' claims under the Free Exercise Clause of the First Amendment,⁴⁵³ the Court examined the plaintiffs' argument that the American Indian Religious Freedom Act (AIRFA) authorized an injunction against the completion of the roads at issue.⁴⁵⁴ AIRFA, enacted in 1978, provides that it is U.S. policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."⁴⁵⁵ The Court rejected the plaintiffs' AIRFA argument, stating that "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."⁴⁵⁶ In a dissenting opinion, Justice Brennan wrote that the Court's decision made a mockery of the policy embodied in AIRFA.⁴⁵⁷

Thus, both the *Lyng* Court and the Hawaii federal district court treated federal statutes that seemed to evince strong federal support for protecting certain Native American rights, as essentially empty and powerless, though seemingly well-intentioned, statements. Moreover, the fact that the language of both AIRFA and NALA supports such interpretations casts into considerable doubt the real commitment of Congress to addressing continued violations of important Native American rights. Where NALA is concerned, this adds to the impression arising from Congress's support for English-only legislation⁴⁵⁸ and from the limited funding that has been available under NALA of 1992⁴⁵⁹ that Congress lacks serious, sustained interest in protecting the languages that were for so long a target of government eradication efforts.

⁴⁵² See *id.* at 441–42.

⁴⁵³ See *id.* at 447–53.

⁴⁵⁴ See *id.* at 455.

⁴⁵⁵ Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (1994)).

⁴⁵⁶ *Lyng*, 485 U.S. at 455. For a discussion of *Lyng*, see Dussias, *supra* note 12, at 828–31.

⁴⁵⁷ See *Lyng*, 485 U.S. at 477 (Brennan, J., dissenting).

⁴⁵⁸ See *supra* notes 299–396 and accompanying text (discussing proposed English-only legislation).

⁴⁵⁹ See *supra* notes 288–92 and accompanying text (discussing the amount of funding available under NALA of 1992).

B. *Native American Initiatives to Revitalize and Protect Their Languages*

The dominant society has absolutely no interest in our language and culture. I stand vehemently opposed to looking in that direction for help with this particular situation.⁴⁶⁰

Contemporary Native Americans have not relied solely on the federal government to help them undo the lingering effects of past government efforts to eradicate their languages. In addition to pursuing programs under NALA, financed by the small amount of funding made available pursuant to NALA of 1992, Native American individuals, tribes, and other groups have established a variety of programs aimed at reversing the effects of language discrimination and rescuing Native American languages from the brink of extinction. After a discussion of the status of Native American languages today, some of the Native American efforts to revitalize and protect their native languages are discussed below, including the motivations behind such efforts.

1. *The Current Status of Native American Languages*

Current statistics on Native American languages give an indication of the effectiveness of federal government efforts to eradicate Native American languages and replace them with English, as well as of the effects of other assimilationist pressures. Despite the concerted efforts to destroy them, most North American native languages have survived. According to one estimate, as of 1998, 211 of the roughly 300 native languages that existed in what is today the United States and Canada at the time of European arrival were still being spoken.⁴⁶¹ On the one hand, then, the story of Native American languages today is the story of survival against great odds.

Nevertheless, the future of many Native American languages is in great danger today, and some are on the brink of extinction. U.S. Census data released in 1995 on American Indian languages spoken at home by American Indians aged five and over estimated that in 1990, such languages were spoken by

⁴⁶⁰ Ivan F. Star Comes Out, *Families Must Help Language Survive*, INDIAN COUNTRY TODAY, Dec. 22–29, 1997, at B10. The author is an Oglala Lakota educator. *See id.*

⁴⁶¹ *See* Brooke, *supra* note 292, at A1; *cf. supra* note 267 and accompanying text (stating that only about 155 Native American languages were still spoken or remembered); *infra* note 466 and accompanying text (stating that 175 Native American languages are still spoken in the United States). Indigenous languages in other nations have suffered even greater damage. In the Amazon area of Peru, for example, linguists estimate that 100–150 languages existed at the time the Spanish arrived and began imposing their language on the indigenous peoples of the region. *See Cultural Loss Seen as Languages Fade*, N.Y. TIMES, May 16, 1999, at 12. Today, only 57 of the languages survive and 25 of them are in danger of extinction. *See id.*

281,990 persons,⁴⁶² out of a total American Indian population aged five and over of 1,749,558.⁴⁶³ The languages spoken by the largest number of persons were the Athapaskan-Eyak languages, spoken by an estimated 157,694 persons.⁴⁶⁴ According to one set of 1997 estimates, of the 200 North American Indian languages, only about 50 have more than 1000 speakers; only a handful have more than 50000 speakers.⁴⁶⁵

The status of Native American languages can also be assessed by determining which generations are learning and speaking them within a particular tribe. In 1998, linguist Michael Krauss calculated that of 175 Native American languages still spoken in the United States, only 20 were still spoken by mothers to babies, indicating that children were being raised in the language;⁴⁶⁶ while 30 were spoken by parents and grandparents;⁴⁶⁷ 70 were spoken almost entirely by grandparents;⁴⁶⁸ and 55 were spoken by 10 or fewer elderly tribal members.⁴⁶⁹ The fact that a language is no longer spoken by

⁴⁶² See U.S. Bureau of the Census, *American Indian Languages Spoken at Home by American Indian Persons 5 Years and Over in Households: 1990*, Table 3, (visited Oct. 24, 1999) <<http://www.census.gov/population/socdemo/race/indian/ailang3.txt>>.

⁴⁶³ See U.S. Bureau of the Census, *Selected Social and Economic Characteristics for the 25 Largest American Indian Tribes: 1990*, Table 2, (visited Oct. 24, 1999) <<http://www.census.gov/population/socdemo/race/indian/ailang2.txt>>.

⁴⁶⁴ See U.S. Bureau of the Census, *American Indian Languages Spoken at Home by American Indian Persons 5 Years and Over in Households: 1990*, Table 3, (visited Oct. 24, 1999) <<http://www.census.gov/population/socdemo/race/indian/ailang3.txt>>.

⁴⁶⁵ See Crystal, *supra* note 397, at 43. Canadian indigenous languages are also threatened. Of the approximately fifty aboriginal languages, only three are spoken widely enough to ensure their continued survival. See *Canada's Aboriginal Languages Disappear*, INDIAN COUNTRY TODAY, Mar. 8–Mar. 15, 1999, at C2. The endangered languages often have only a few hundred speakers and rarely more than a few thousand. See *id.*

⁴⁶⁶ See Brooke, *supra* note 292, at A1 & A22. These languages included the following: Navajo, Western Apache, Hopi, Zuni, and Havasupai-Hualapai in New Mexico and Arizona; Yupik in Alaska; Choctaw in Mississippi; Cherokee in Oklahoma; and Lakota-Dakota in the northern Plains. See *id.* at A22. Linguist Michael Krauss provided information to Congress at the time that Congress was considering the bill that became NALA of 1992. See *supra* note 267.

⁴⁶⁷ See Brooke, *supra* note 292, at A22. These languages included the following: Gwich'in in Alaska; Mesquakie in Iowa; Cheyenne and Crow in Montana; and Jicarilla Apache in New Mexico. See *id.*

⁴⁶⁸ See *id.* at A1 & A22. These languages included the following: Tlingit in Alaska; Yuma in California; Passamaquoddy in Maine; Winnebago in Nebraska; Oneida and Seneca in New York; Hidatsa in North Dakota; Comanche in Oklahoma; Nez Perce in Oregon; and Kalispel, Makah, and Yakima in Washington. See *id.* at A22.

⁴⁶⁹ See *id.* at A1 & A22. These languages included the following: Eyak in Alaska; Washoe in California; Penobscot in Maine; Omaha in Nebraska; Tuscarora in New York;

children is an important indication that it is in imminent risk of extinction.⁴⁷⁰

Information on individual tribes bears out the grim picture presented by statistics like those above, particularly with respect to the loss of fluency in younger generations. For example, in the Crow Tribe, with 9300 enrolled members, 77% of Crows aged 66 or older speak Crow, while only 13% of preschoolers do.⁴⁷¹ In the Navajo Nation, only 30% of first graders are native speakers, while 90% were in 1968.⁴⁷² Of the fifty surviving languages in California, once the home of eight languages, none is being spoken by children.⁴⁷³ The Confederated Tribes of the Warm Springs Indian Reservation, located in Oregon, have reported that their three languages, Sahpatin, Wasco, and Paiute, are spoken now by fewer than one hundred tribal members.⁴⁷⁴ Lakota educators have reported that fluency rates are very low among Lakotas aged one to twenty, while fluency rates are high among older Lakotas, with most fluent speakers aged forty or above.⁴⁷⁵ Given the relatively young age of the Native American population as a whole,⁴⁷⁶ the lack of fluency among the most

Mandan in North Dakota; Pawnee and Wichita in Oklahoma; and Chehalis, Clallam, Cowlitz, and Snohomish in Washington. *See id.* at A22.

⁴⁷⁰ *See* James Geary, *Speaking in Tongues: As Telecommunications, Tourism and Trade Make the World a Smaller Place, Languages Are Dying at an Alarming Rate*, TIME INT'L, July 7, 1997, at 52.

⁴⁷¹ *See* Brooke, *supra* note 292, at A22.

⁴⁷² *See id.*

⁴⁷³ *See id.* The Indian languages of Oklahoma are also either extinct or endangered, with roughly one-third of the languages already extinct and some others spoken by thirty or fewer tribal members. *See Oklahoma Indian Languages Listed Extinct, Endangered*, INDIAN COUNTRY TODAY, Mar. 8–Mar. 15, 1999, at C2. Although there are about 10,000 fluent speakers of Cherokee, most of them are tribal elders. *See id.*

⁴⁷⁴ *See Forensic Data Experts Offer, Reclaim Archives*, INDIAN COUNTRY TODAY, Aug. 25–Sept. 1, 1997, at C1. The three tribes residing on the reservation are the Warm Springs, Wasco, and Paiute Tribes. *See id.*

⁴⁷⁵ *See* Star Comes Out, *supra* note 460, at B10 (citing an Oglala Lakota College sociolinguistic survey).

⁴⁷⁶ For example, according to U.S. Census data released in 1995, an estimated 9.7% of the American Indian population was under age 5 in 1990 (as opposed to 7.3% of the U.S. population). *See* U.S. Bureau of the Census, *Selected Social and Economic Characteristics for the 25 Largest American Indian Tribes: 1990*, Table 2, (visited Oct. 24, 1999) <<http://www.census.gov/population/socdemo/race/indian/ailang2.txt>>. Twenty-four percent of the population was aged 5–17 (as opposed to 18.3% of the U.S. population). *See id.* (indicating that 9.7% of the American Indian population—and 7.3% of the U.S. population—was under age 5 and 65.8% of the American Indian population—and 74.4% of the U.S. population—was age 18 and over). Only 5.9% of the American Indian population is age 65 or older (as opposed to 12.5% of the U.S. population). *See also*, FY 1999 Budget Request for the Bureau of Indian Affairs Before the Subcomm. on Interior and Related Agencies, Comm. on Appropriations,

populous group within the tribes is particularly alarming.

Language extinction is a constant threat in tribes with only a few elderly speakers of the language remaining. As of April 1998, for example, there were only eight surviving fluent speakers of Hupa, a California Indian language.⁴⁷⁷ In 1995, the last native speaker of Northern Pomo, a California native language, died.⁴⁷⁸ In 1996, Red Thunder Cloud, the last speaker of Catawba, died, and, in the words of one journalist, took "to the grave the last human link to the ancient language of his people."⁴⁷⁹ Languages can also become seriously endangered in a relatively short period of time. Tlingit, for example, was spoken by the entire tribe forty years ago, but is now spoken by only a handful of people in southern Alaska and Canada.⁴⁸⁰ Thirty years ago, there were still 70 fluent speakers of Quileute, the language of the Quileute Indians of Washington, but by 1997 only one was left.⁴⁸¹

Thus, although many Native American languages survived the federal government's efforts to eradicate them, there is cause for great concern about the future vitality and continued existence of many of these languages. Years of efforts to destroy Native American languages have clearly taken their toll. Moreover, other past government conduct, namely, the widespread removal of Indian children from their homes for adoption, foster care, or other placements in non-Indian homes or institutions⁴⁸² that occurred prior to the enactment of the

105th Cong. (1998) (statement of Kevin Gover), *available in* <<http://www.doi.gov/bia/testimony/testhou.htm>> at 2 (visited Oct. 24, 1999) (stating that, according to the 1990 census, the median age of Indians was 26, compared to a median age of 33 for the population at large).

⁴⁷⁷ See Brooke, *supra* note 292, at A22.

⁴⁷⁸ See Salopek, *supra* note 216, at 6A.

⁴⁷⁹ David Stout, *Red Thunder Cloud, 76, Dies, and Catawba Tongue with Him*, N.Y. TIMES, Jan. 14, 1996, at 33; see also Pamela M. Walsh, *Red Thunder Cloud, Efforts Helped Preserve Catawba Language*: at 76, BOSTON GLOBE, Jan. 14, 1996, at 44 (noting that the Catawba Nation credited Red Thunder Cloud with "single-handedly keeping its language and much of its culture alive for the past 40 years").

⁴⁸⁰ See Geary, *supra* note 470, at 1. Nearly all of the remaining speakers are over age 60. See *id.*

⁴⁸¹ See Crystal, *supra* note 397, at 43, 45 (noting that the last surviving speaker was 80-year-old Lillian Pullen). According to a 1996 report, over 70 children attending the Quileute tribal school were learning the Quileute language. See VERONICA E. VELARDE TILLER, AMERICAN INDIAN RESERVATIONS AND TRUST AREAS 595 (1996); see also *Cultural Loss Seen as Languages Fade*, *supra* note 461, at 12 (noting that there was only one surviving fluent speaker of Chamicuro, the language of a Peruvian indigenous group).

⁴⁸² For discussions of practices like these, which led to the enactment of the Indian Child Welfare Act, see Lorie A. Graham, "*The Past Never Vanishes*": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 23-32 (1998); Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10

Indian Child Welfare Act in 1978,⁴⁸³ undoubtedly contributed to the endangered status of many languages today. This separation of Indian children from their communities, which, like the English-only policy, was based at least in part on negative attitudes toward Indian culture and the desire for Indian assimilation,⁴⁸⁴ necessarily reduced the number of Indian children to whom Native American languages could be passed.

2. *The Importance of Preserving Native American Languages*

The threat of extinction facing many Native American languages has of course not gone unnoticed by contemporary Native Americans. Many have eloquently explained how important the survival of their language is to the survival of their tribe. A number of common themes emerge in their discussions of this important issue.

Native Americans concerned about the loss of their languages have commented on the link between their languages and their cultures. Nineteenth-century government officials were aware of this link as well, although for them it meant that the languages must be destroyed as part of the efforts to destroy Native American cultures.⁴⁸⁵ In the twentieth century, supporters of both NALA and proposed English-only legislation have commented on this connection as well.⁴⁸⁶ These disparate groups have understood that language and culture are learned together and are inseparable. Lakota educator Ivan Star Comes Out has noted that Lakota culture "is integral of the language,"⁴⁸⁷ and that in the past,

LAW & INEQ. J., June 1992, at 311, 314–17. When the Association of American Indian Affairs began documenting the number of Indian children removed from their homes, it discovered that one-third of all Indian children were being placed in educational institutions, foster care, or adoptive homes. At least 85% of these placements were in non-Indian homes or institutions. *See id.* For a Canadian Ojibway's perspective on the damage to language acquisition that results from placement in a non-native home, see Richard Wagamese, *Patience, Language is Gift for Those Who Return*, INDIAN COUNTRY TODAY, Feb. 15–Feb. 22, 1999, at A5 (discussing his efforts to reclaim his native language after many years in foster care).

⁴⁸³ Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (1994). The Act established a comprehensive scheme for adjudicating Indian child custody cases that ensures a substantial role for tribal governments. For a brief description of the Act and what it was meant to accomplish, see Graham, *supra* note 482, at 32–34.

⁴⁸⁴ *See* Graham, *supra* note 482, at 25–28 (discussing the assimilative attitudes and prejudices that underlay many child placement decisions).

⁴⁸⁵ *See supra* notes 51–55 and accompanying text (discussing government officials' views on the link between language and culture).

⁴⁸⁶ *See supra* notes 223–38, 328–31, and accompanying text.

⁴⁸⁷ Ivan F. Star Comes Out, *The Lakota Language Nears Extinction*, INDIAN COUNTRY TODAY, Sept. 28–Oct. 5, 1998, at A5.

"[t]he language, and all the cultural teachings that go with it, were effectively transmitted from elder to adult to youth."⁴⁸⁸

Native Americans and others also have expressed the interconnection between language and culture in terms of the link between a language and the world view of those who speak it. Ivan Star Comes Out, for example, has described the position of people who speak both English and Lakota in the following terms: "People who are fluent in a Native language and English speak and think two separate world views and/or philosophies. They possess an understanding of the European and Lakota world perspectives. . . . It is a matter of how a person thinks and perceives the world."⁴⁸⁹ Navajo educator Rena Henry has also commented on how learning Navajo as well as English will enable Navajo children to "walk in both worlds."⁴⁹⁰ Daniel Ammon, a Hupa high school teacher, has explained that the Hupa language "is part of our culture. . . . It contains how a Hupa person views the world."⁴⁹¹ As David Crystal has noted, because of the uniqueness of the world view that is tied to each language, the extinction of a language means that the whole world has suffered a loss:

To lose a language is to lose a unique insight into the human condition. Each language presents a view of the world that is shared by no other. Each has its own figures of speech, its own narrative style, its own proverbs, its own oral or written literatures. Preserving a language may also be instructive; we can learn from the way in which different languages structure reality⁴⁹²

Language is also linked to self-image, identity, and self-respect. As David Crystal has written, "Language is more than a shared code of symbols for communication. People do not fight and die . . . to preserve a set of symbols. They do so because they feel that their identity is at stake—that language preservation is a question of human rights, community status and nationhood."⁴⁹³ Sam Billison, the 1997 President of the Navajo Code Talkers Association, has commented on how the Navajo language "gives our children

⁴⁸⁸ Ivan F. Star Comes Out, *Close to Extinction: Give in or Resist*, INDIAN COUNTRY TODAY, Oct. 12–19, 1998, at A5.

⁴⁸⁹ Star Comes Out, *supra* note 487, at A5; *see also* Star Comes Out, *supra* note 460, at B10 ("[P]eople of dual-languages speak and think two separate philosophies; . . . they possess an understanding of the European and Lakota world perspectives. These philosophies are as different as night and day.").

⁴⁹⁰ *Navajo Language Legacy Preserved*, INDIAN COUNTRY TODAY, Sept. 28–Oct. 5, 1998, at C1.

⁴⁹¹ Brooke, *supra* note 292, at A22 (quoting Daniel Ammon).

⁴⁹² Crystal, *supra* note 397, at 44.

⁴⁹³ *Id.*; *see also id.* at 43 ("Language . . . is truly at the heart of a culture. It is a matter of identity, of nationhood.").

self-image and self-respect.”⁴⁹⁴ Charlotte Black Elk, a Lakota, whose father was beaten as a child for speaking Lakota in white schools and who recalls being ridiculed as a child for speaking Lakota, now speaks Lakota freely.⁴⁹⁵ She explains, “I can’t not speak it. . . . Lakota is who I am.”⁴⁹⁶ Dixie Davis, a Yavapai, remembers having her mouth washed out with soap and being deprived of food for speaking her native language in boarding school.⁴⁹⁷ Davis has explained that “[y]ou have to maintain who you are, whether you are Indian or not. When you meet your maker, you had better know who you are. . . . If you lose your language, you lose your people.”⁴⁹⁸ Daniel Ammon, a Hupa, has said that for the Hupa to lose their language “would be to lose our identity.”⁴⁹⁹ Rosita Whitehorse, an O’odham language teacher, has expressed this concern in evocative terms: “If the people lose their language, they will lose their identity. They will be in the mainstream, falling through the rocks.”⁵⁰⁰ Ivan Star Comes Out has argued that identity, positive self-esteem, and pride are the reasons for learning the Lakota language, along with Lakota culture and history, while Lakota children have been taught that being different is bad and that they must assimilate.⁵⁰¹ Linguist Ben Ramirez-Shkwegnaabi has commented that the high suicide rate among Native American youths is attributable to loss of voice and identity which can result from the loss of native languages⁵⁰²—a loss that ultimately silences these youths forever. Ben Nighthorse Campbell also cited the link between loss of identity, suicide, substance abuse, and the role that native language revitalization could play in restoring a sense of identity in his remarks in the House of Representatives on NALA of 1992.⁵⁰³

The approach taken in the development of a recently published Hopi dictionary reflected the compilers’ understanding of the ties between language and the culture, and the impossibility of fully understanding a language outside of its cultural context. Ekkehart Malotki, a professor of languages who was a key

⁴⁹⁴ Ted Rushton, “*English Only*” Meets Opposition, INDIAN COUNTRY TODAY, Feb. 16–23, 1998, at C2 (quoting Sam Billison).

⁴⁹⁵ See Tracey A. Reeves, *Posters Hail Minority Women: Campaign Spotlights Ability to Preserve Culture, Language*, SEATTLE TIMES, Aug. 11, 1997, at A9.

⁴⁹⁶ *Id.* (quoting Charlotte Black Elk).

⁴⁹⁷ See Brenda Norrell, *Language—the Root of Being: Dixie Davis Fights to Keep the Yavapai Language Alive*, INDIAN COUNTRY TODAY, Mar. 9–16, 1998, at B7.

⁴⁹⁸ *Id.* (quoting Dixie Davis).

⁴⁹⁹ Brooke, *supra* note 292, at A22 (quoting Daniel Ammon).

⁵⁰⁰ Brenda Norrell, *Cyber O’odham: An Ancient Language Goes on the Internet*, INDIAN COUNTRY TODAY, May 4–11, 1998, at A1.

⁵⁰¹ See Star Comes Out, *supra* note 488, at A5.

⁵⁰² See Salopek, *supra* note 216, at 6A.

⁵⁰³ See *supra* note 279 and accompanying text.

contributor to the project of compiling the dictionary, has explained that he and his colleagues “tried to inventory the entire spectrum of ideas, interests and concerns that the Hopi have developed linguistically over the centuries. . . . The dictionary is thus a true storehouse of everything[,] tangible and intangible, that make[s] up the fabric of their world reality. . . . Words without context are like corpses.”⁵⁰⁴ Because of this approach, the 900-page dictionary “preserves not only a language but a way of life.”⁵⁰⁵

Language is also tied to tribal history and inherited knowledge. Charlotte Black Elk has commented that she uses the Lakota language as a way to hold on to Lakota tradition.⁵⁰⁶ She notes that “[o]ur history is who we are. . . . To forget is not to belong.”⁵⁰⁷ When the last speakers of Native American or other languages die, they take with them the oral history of their people.⁵⁰⁸ When a language disappears, the knowledge developed by its speakers throughout history can be lost, particularly if the language is unwritten. In the words of David Crystal, “[T]he loss of a language means a loss of inherited knowledge that extends over hundreds or thousands of years [W]hen a language without a writing system disappears, its speakers’ experience is lost forever. . . . Language loss is knowledge loss, and it is irretrievable.”⁵⁰⁹ Commenting on the loss of knowledge that would accompany the loss of the Navajo language, Clay Slate, the manager of the Navajo Language Program, stated, “There are a lot of things that if they aren’t done in Navajo, they can’t be done at all.”⁵¹⁰ Native American author N. Scott Momaday has written that cultures with a strong oral tradition have a special relationship with language that causes them to pay great attention to words and treat them with care,⁵¹¹ which

⁵⁰⁴ Kris Knights, *Hopi Dictionary New Tool to Keep Language, Culture Alive*, INDIAN COUNTRY TODAY, Jan. 4–11, 1999, at C2.

⁵⁰⁵ *Id.* An ongoing project to develop a Chinook dictionary has drawn on oral histories of and interviews with elders on the Grand Ronde Reservation in Oregon. See Oscar Johnson, *Grand Ronde Tribe Re-Mapping its Indigenous Language*, INDIAN COUNTRY TODAY, Mar. 29–Apr. 5, 1999, at C5. The dictionary’s compiler has developed the first phonetically accurate alphabet for the language, which contains at least 20 sounds that cannot be represented properly with the English alphabet. See *id.*

⁵⁰⁶ See Reeves, *supra* note 495, at A9.

⁵⁰⁷ *Id.* (quoting Charlotte Black Elk).

⁵⁰⁸ See Crystal, *supra* note 397, at 40.

⁵⁰⁹ *Id.* at 44; see also Salopek, *supra* note 216, at 6A (noting that endangered tribal languages each represent “millennia worth of accumulated knowledge and culture”).

⁵¹⁰ Brodsky, *supra* note 216, at C02 (quoting Clay Slate). Natalia Sangama, the last surviving fluent speaker of Chamicuro, an indigenous language of Peru, has expressed similar sentiments, noting that “[s]ome things cannot be said in Spanish.” See *Cultural Loss Seen as Languages Fade*, *supra* note 461, at 12.

⁵¹¹ Momaday wrote that in the oral tradition:

suggests that for such cultures, the loss of their languages would be particularly harmful.

The ability to speak a tribe's native language also has important implications for religious practices. Native Americans who are interested in participating in traditional practices feel that they cannot pray to their ancestors in English.⁵¹² Leanne Hinton, a linguistics professor who conducts a summer program for California Indians who are interested in reviving their languages, has noted that "[a] number of people have learned how to pray in their language They are starting to reinvent their languages so they can pray at ceremonies and funerals."⁵¹³ Navajo Sam Billison has also commented on the link between language and religious practices: "Navajo culture and philosophy dictates that our language is an integral part of our religion. All of our ceremonial songs and prayers are in our language"⁵¹⁴

Thus, contemporary Native Americans treasure their surviving languages, and identify many reasons why they need to be revitalized and preserved. Their reasons for wanting to preserve and speak their languages in fact echo the reasons that federal government officials gave in the past for wanting to eradicate these languages and replace them with English. Both contemporary Native Americans and past government officials recognized the links between Native American languages and Native American identity and self-image, culture (including religious practices), and history.⁵¹⁵ Both groups realized how much is at stake in the struggle for the preservation of Native American languages, which resulted in diametrically opposed attitudes toward these languages.

[O]ne stands in a different relation to language. Words are rare and therefore clear. They are zealously preserved in the ear and mind. Words are spoken with great care, and they are heard. They matter greatly, and they must not be taken for granted, they must be taken seriously, and they must be remembered.

N. Scott Momaday, *The Native Voice in American Literature*, in COLUMBIA LITERARY HISTORY OF THE UNITED STATES 6 (Emery Elliott ed., 1988), quoted in Frank Pommersheim for Shermann Marshall, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 428–29.

⁵¹² See Brooke, *supra* note 292, at A22.

⁵¹³ *Id.* (quoting Leanne Hinton).

⁵¹⁴ Rushton, *supra* note 494, at C2 (quoting Sam Billison).

⁵¹⁵ See *supra* notes 51–55 and accompanying text (discussing federal government officials' reasons for seeking to eradicate Native American languages and replace them with English).

3. *Contemporary Native American Efforts to Revitalize and Protect Their Languages*

In recognition of the importance of Native American languages, Native American individuals, tribes, and other groups have established many programs aimed at preserving and revitalizing their languages. As journalist Brenda Norrell has put it, "Today, the battle at hand is keeping the language and culture alive."⁵¹⁶ Native Americans have received relatively little assistance from the federal government in this endeavor. Although the federal government was willing to devote substantial resources to efforts to eradicate Native American languages, which undoubtedly had a profound adverse effect on the survival of the languages and on those who speak them,⁵¹⁷ the government has been reluctant to provide meaningful support to assist Native Americans in their efforts to reclaim their languages. Although the government was eager to utilize the languages of the Navajos and other tribes for its own purposes during wartime,⁵¹⁸ it has been much less interested in these languages in peacetime. NALA, described by one commentator as "largely a gesture of sympathy,"⁵¹⁹ states an admirable policy,⁵²⁰ but there has been little government action to support the policy and, as the result in *Office of Hawai'ian Affairs v. Department of Education*⁵²¹ demonstrates, Native Americans are seemingly unable to use the statute by themselves in their efforts to revitalize their languages.⁵²² NALA of 1992 has provided only meager financial assistance,⁵²³ especially in light of the number of existing Native American languages and the threats of government-promoted extinction facing many of them.⁵²⁴ As noted above,⁵²⁵ the low priority

⁵¹⁶ Norrell, *supra* note 497, at B7.

⁵¹⁷ Native Americans have of course been eyewitnesses to the adverse effects that past government policies have had on Native Americans and their languages. For example, James Jackson, Jr., one of the few remaining speakers of Hupa, described the following incident from his childhood: "The teacher at the Indian school grabbed my friend by the arm and said, 'You're speaking your language—I'm going to wash your mouth out with soap,' That's where we lost it." Brooke, *supra* note 292, at A1 (quoting James Jackson, Jr.).

⁵¹⁸ See *supra* notes 141–216 and accompanying text (discussing the code talkers).

⁵¹⁹ Salopek, *supra* note 216, at 6A.

⁵²⁰ See *supra* notes 239–53 and accompanying text (discussing the provisions of NALA).

⁵²¹ 951 F. Supp. 1584 (D. Haw. 1996).

⁵²² See *supra* notes 398–459 and accompanying text (discussing the case and its outcome).

⁵²³ See *supra* notes 259–92 and accompanying text (discussing NALA of 1992).

⁵²⁴ See *supra* notes 461–84 and accompanying text (discussing the status of Native American languages).

⁵²⁵ See *supra* note 292 and accompanying text.

given to Native American language preservation has been highlighted by linguist Michael Krauss, who has pointed out that while the government spends only \$2 million per year to save endangered Native American languages, it spends \$1 million per year per Florida panther to save that species from extinction.⁵²⁶

In their published writings, some Native Americans have voiced their opinion of the necessity of Native Americans' reliance on their own language-preservation initiatives for success, in light of the indifference of the federal government and many Americans. Many groups apparently have determined that they must take the initiative to establish whatever language programs they can, even in the absence of federal funding. Ivan Star Comes Out, a Lakota, has expressed his belief in the need for Native American language preservation initiatives in strong terms: "[T]he dominant society has absolutely no interest in . . . native language and culture. People of European origin have no stake in this. In fact, the only stake they had was in destroying indigenous languages and cultures."⁵²⁷ Star Comes Out has criticized efforts to teach Lakota in government schools as being "a token gesture."⁵²⁸ He argues that "[t]his entire effort is being done from a European lineal perspective of the world. Native languages and cultures do not fit into this pattern."⁵²⁹ Schools, the government, and other western-based institutions, he maintains, cannot rescue Lakota; rather, parents, families, and the community must take charge.⁵³⁰

Native American individuals, tribes, and other groups have used a number of tactics and launched many programs aimed at preserving and revitalizing their languages. Tribal governments have taken such actions as establishing the tribe's original language as the official language of the reservation (if it does not already enjoy this status) and adopting resolutions encouraging tribal members to speak the tribe's language.⁵³¹ Elders and other fluent speakers of the tribe's language have been honored and recognized as priceless living repositories of tribal language, culture, and traditions.⁵³² Programs have been established for tribal

⁵²⁶ See Brooke, *supra* note 292, at A1. Krauss has also noted the seriousness of the threat of extinction for languages in comparison to threats to living species, stating that "[t]he linguistic collapse in diversity is far greater, proportionally, than the world's biodiversity crisis." Salopek, *supra* note 216, at 6A (quoting Michael Krauss).

⁵²⁷ Star Comes Out, Ivan Star Comes Out, *Close to Extinction: What Can Be Done?*, INDIAN COUNTRY TODAY, Oct. 5-Oct. 12, 1998, at A5; see also Star Comes Out, *supra* note 460, at B10.

⁵²⁸ See Star Comes Out, *supra* note 488, at A5.

⁵²⁹ *Id.*

⁵³⁰ See *id.*

⁵³¹ See, e.g., Brooke, *supra* note 292, at A22 (describing actions taken by the Crow Tribal Council).

⁵³² See *id.* (describing actions taken by the Crow Tribal Council). The Crow Tribal

members to study with tribal elders in order to learn the tribe's language and traditional ways from them. For example, an organization called the Native California Network sponsors "apprentices" who participate in intensive language immersion programs, sometimes involving up to five hundred hours of instruction, with tribal elders acting as "masters."⁵³³ Efforts have also been made to record the language knowledge of elderly speakers before they die and take their knowledge of their tribal language and culture with them. For example, in the 1940s, Red Thunder Cloud, the last speaker of Catawba, made a complete recording of all that he knew of Catawba, as well as some traditional Catawba songs,⁵³⁴ and, in the 1990s, he worked with linguists who were working on a Catawba primer.⁵³⁵ Similarly, efforts are being made to record as much of Tlingit as possible by translating a wide variety of texts into the language.⁵³⁶ Vi(taqwseblu) Hilbert, an historian and elder of the Upper Skagit Tribe, has been recording conversations with other tribal elders since the 1950s and has published a number of books, including a dictionary, as part of a concerted effort to preserve her tribe's Lushotseed language.⁵³⁷

Language instruction has also been made a part of educational programs at all levels. Native American languages are being taught to Native American children in elementary and secondary educational institutions. In Hoopa, California, for example, students in the regional high school can study Hupa, Karuk, and Yurok, the three languages of the Indians of the area.⁵³⁸ Tribes have also established summer language classes and camps.⁵³⁹ Classes are also taught at tribal community centers, such as the Hoopa Community Center in California, where students are learning from the few surviving fluent speakers of Hupa,⁵⁴⁰ and the Fort McDowell Recreation Center, where Yavapai tribal member Dixie

Council has honored fluent speakers as "tribal treasures." *See id.*

⁵³³ *See* Brooke, *supra* note 292, at A22.

⁵³⁴ *See* Stout, *supra* note 479, at 33; *see also* Walsh, *supra* note 479, at 44.

⁵³⁵ *See* Walsh, *supra* note 479, at 44.

⁵³⁶ *See* Geary, *supra* note 470.

⁵³⁷ *See* Douglas Casgraux, *Elder, Linguist, Historian*, INDIAN COUNTRY TODAY, Dec. 21-28, 1998, at 11 (Many Winters Supplement).

⁵³⁸ *See* Brooke, *supra* note 292, at A22. High school students in Tucson and Sells, Arizona are learning the O'odham language via the Internet. *See* Norrell, *supra* note 500, at A1.

⁵³⁹ *See* Brooke, *supra* note 292, at A22 (describing programs in Cheyenne and Blackfeet); *see also* Cathy Cashio-Kauchick, *Navajo Camp Reverses Language Loss*, INDIAN COUNTRY TODAY, Aug. 8-Aug. 16, 1999, at C2 (discussing the success of a Navajo language immersion camp).

⁵⁴⁰ *See* Brooke, *supra* note 292, at A1 & A22.

Davis teaches her tribe's language.⁵⁴¹ Some of the tribal elders and others involved in these programs were themselves subjected to the federal English-only policy while they were students. Clovia Malatare, for example, who grew up on the Pine Ridge Reservation, has commented that she was part of "the last generation of boarding school kids to be whacked by a broom for speaking Lakota."⁵⁴² Lakota educator Ivan Star Comes Out has argued for recognition of the importance of using community-based efforts, like the foregoing, and family-based efforts, to learn Native American languages, rather than relying solely on school-based bilingual education programs.⁵⁴³

Focusing on one particular tribe, the Navajos, demonstrates the variety of ways in which language programs can be made part of educational programs. Navajo students in New Mexico participate in a Navajo-English bilingual program first developed by Navajo educator Rena Henry.⁵⁴⁴ In the 1980s, the Navajo Tribal Council called for all children to be taught in Navajo,⁵⁴⁵ and adopted an education policy requiring that Navajo be made available to all grade levels in schools serving the Navajo Nation.⁵⁴⁶ Bureau of Indian Affairs and state

⁵⁴¹ See Norrell, *supra* note 497, at B7.

⁵⁴² See Salopek, *supra* note 216, at 6A (quoting Clovia Malatare); see also Norrell, *supra* note 497, at B7 (describing the boarding school experience of Dixie Davis, a Yavapai) and *supra* note 517 (describing the boarding school experience of James Jackson, Jr., a Hupa).

⁵⁴³ See Star Comes Out, *supra* note 460, at B10. Star Comes Out has criticized current bilingual education programs:

The current method of teaching Lakota language in our schools has been through incorporation: taking culture and fitting them into the system, or it is being used to enhance English language concepts and skills.

It is like squaring the round post to make it fit into the square hole. This could possibly work, but it is the negative attitudes of school personnel toward Native language and culture that deters their effectiveness. Even with federal support (Title VII and IV), language and cultural concepts have remained at the extreme outer edges of the established system.

Star Comes Out, *supra* note 488, at A5.

⁵⁴⁴ See *Navajo Language Legacy Preserved*, *supra* note 490, at C1, C2; see also Rushton, *supra* note 494, at C2 (quoting a statement by Sam Billison that "[t]he Navajo Nation requires schools on and near the reservation to teach Navajo language and Navajo culture"). The Hopis have also implemented tribal language programs in their schools. See Knights, *supra* note 504, at C2.

⁵⁴⁵ See Brodsky, *supra* note 216, at C02 (stating that the Tribal Council called for all children to be taught Navajo in 1982).

⁵⁴⁶ See Deenise Becenti, *Tribal Students to Be Taught Navajo First*, SALT LAKE TRIB., Aug. 5, 1995, at B1 (stating that the Tribal Council adopted the education policy in a 1984 law).

public schools, however, were reluctant to comply with the policy.⁵⁴⁷ In 1995, Navajo Nation President Albert Hale issued an executive order requiring that Navajo be taught before English in the Navajo Head Start programs.⁵⁴⁸ One school on the Navajo Reservation, the Ganado Primary School, has received nationwide recognition for its outstanding program, and one of the major factors believed to be responsible for its success is its emphasis on ensuring that students learn Navajo.⁵⁴⁹

The limited availability of teachers of Native American languages continues to be an important issue. In at least one state, easing the formal certification requirements for Indian language instructors, which was encouraged by NALA,⁵⁵⁰ has led to increased language instruction,⁵⁵¹ while tribes are endeavoring to ensure that language instructors are competent to offer high quality instruction.⁵⁵² In 1989, Navajo Community College established the first full-time program in North America for training indigenous language teachers.⁵⁵³ By 1994, over five hundred teachers certified through the program were teaching on the Navajo Reservation.⁵⁵⁴

Native American language programs in higher education have also been expanded. At least one-fourth of tribal colleges, where twenty-five different languages are taught, now require their students to study language.⁵⁵⁵ Some nontribal higher education institutions, such as Idaho State University, have also

⁵⁴⁷ See *id.*

⁵⁴⁸ See *id.* Hale noted that the Head Start programs are the only areas in which the Nation has some control and influence on the curriculum and that the Head Start programs were the best place for the policy to start. See *id.*

⁵⁴⁹ See K. Marie Porterfield, *Navajo Language Focus of Top Primary School*, INDIAN COUNTRY TODAY, Oct. 27–Nov. 3, 1997, at A1.

⁵⁵⁰ See *supra* note 243 and accompanying text (discussing NALA's provision on teacher certification requirements).

⁵⁵¹ See Brooke, *supra* note 292, at A22 (noting the easing of certification requirements in Montana).

⁵⁵² Teachers in a New Mexico English-Navajo bilingual program, for example, are required to complete 24 or more credit hours at a university offering Navajo language studies and receive an endorsement from the New Mexico Department of Education. See *Navajo Language Legacy Preserved*, *supra* note 490, at C1, C2.

⁵⁵³ See Brodsky, *supra* note 216, at C02.

⁵⁵⁴ See *id.* For a description of Navajo Community College and its programs, see *Community College's Education Philosophy Keeps Students Headed in the Right Direction*, INDIAN COUNTRY TODAY, Mar. 9, 1995. See also Stan Bindell, *Ford Foundation and Navajo Nation Train Teachers for Their Community*, NEWS FROM INDIAN COUNTRY, Dec. 15, 1995, at 7B (describing a Northern Arizona University teacher training program funded by the Ford Foundation).

⁵⁵⁵ See Brooke, *supra* note 292, at A22.

added Native American languages to their curriculum as “foreign” languages.⁵⁵⁶

Tribes are even making efforts to revive languages that are no longer spoken. The Mohegans and Pequots in Connecticut, for example, are examining surviving written records of their languages, which have not been spoken since the early twentieth century, in the hope that they can be revived.⁵⁵⁷ Tribes engaging in these kinds of efforts must rely solely on their own resources, because such projects are not even eligible for the limited funding available under NALA of 1992.⁵⁵⁸

Dictionaries and written texts are also being compiled. For example, over the past three decades, over seven thousand words have been entered into a dictionary of the Quileute language,⁵⁵⁹ which has been teetering on the brink of extinction.⁵⁶⁰ A nine hundred page dictionary of Hopi, with almost thirty thousand entries, was recently published—the result of a project that began in 1986.⁵⁶¹ Today, there are dictionaries and written texts for virtually all North American Indian languages.⁵⁶² Also, computer programs have been developed to include characters and phonetic symbols that exist in Native American languages like Navajo.⁵⁶³ In order to help preserve Native languages and to help ensure the availability of writings by Native Americans and Native Canadians, Theytus Books, Inc., a Canadian publishing company staffed entirely by Natives, publishes only the works of Native authors.⁵⁶⁴ Native American leaders have recognized that today some of the greatest threats to the survival of Native

⁵⁵⁶ See *id.*

⁵⁵⁷ See *id.*; see also Geary, *supra* note 470, for a description of a similar effort in Brazil involving an attempt to recover Krenak, a Brazilian indigenous language that was banned until the 1950s but was preserved in writings in Russian and Krenak made by a turn-of-the-century Russian anthropologist.

⁵⁵⁸ See 63 Fed. Reg. 69975 (1998).

⁵⁵⁹ See Tiller, *supra* note 481, at 595.

⁵⁶⁰ See *supra* note 481 and accompanying text (discussing the status of Quileute).

⁵⁶¹ See Knights, *supra* note 504, at C2. The compilers of the dictionary “‘tried to inventory the entire spectrum of ideas, interests and concerns that the Hopi have developed linguistically over the centuries.’” *Id.* (quoting Ekkehart Malotki). The project received funding from the National Endowment for the Humanities. See *id.*

⁵⁶² See Brooke, *supra* note 292, at A22.

⁵⁶³ See *Market Signs in Navajo Language: Reservation Town Finds Something Old in the Familiar*, S.F. CHRON., Mar. 22, 1995, at A8 (describing a computer program developed for Navajo); see also Brodsky, *supra* note 216, at C02 (noting that Navajo is often spelled incorrectly in newspapers because the special fonts needed to reproduce the accent marks are not used).

⁵⁶⁴ See Ron Velasco, *Preserving Our Language: Published Writers and Storytellers Convey in Albuquerque*, INDIAN COUNTRY TODAY, June 1–8, 1998, at C2.

American languages are posed by radio⁵⁶⁵ and by what linguist Michael Krauss has referred to as "the cultural nerve gas of television."⁵⁶⁶ Native Americans have also recognized, however, that while English-language television and radio erode Native American languages, mass media can also be used as vehicles for disseminating Native American languages. The Hopis, for example, have expanded Hopi language radio broadcasts⁵⁶⁷ and the Navajos operate two radio stations that broadcast in Navajo.⁵⁶⁸ The Oklahoma Choctaws have produced native language video dramas.⁵⁶⁹ The Skokomish of Washington have produced a CD-ROM in their language, Twana.⁵⁷⁰ A CD-ROM also became available in 1998 for learning Passamaquoddy.⁵⁷¹ The Confederated Tribes of the Warm Springs Reservation also compiled computer archives, including a language teaching curriculum, of the Sahaptin, Wasco, and Paiute languages.⁵⁷² Tragically, after years of work on the project, much of the information was lost when tribal computers and diskettes were damaged by vandalism in 1997.⁵⁷³ The Ho-chunk, or Winnebago, Tribe has developed computer tutorials, funded by

⁵⁶⁵ See Brooke, *supra* note 292, at A1.

⁵⁶⁶ See *id.* at A22; see also Todd Lewan, *First a Zenith, Then a Nadir: Proud Alaska Tribe Links Loss of its Traditions to Arrival of Televisions*, BOSTON GLOBE, May 29, 1999, at A3 (discussing the damage to the culture and language of the Gwich'in Tribe of Alaska that has been attributed to television).

⁵⁶⁷ See Brooke, *supra* note 292, at A22.

⁵⁶⁸ See *Navajo Language Legacy Preserved*, *supra* note 490, at C1. One of the stations made radio history in 1996 by broadcasting play-by-play action of the Super Bowl in Navajo. See *Super Bowl Play-by-Play to Be Broadcast in Navajo*, ARIZ. DAILY STAR, Jan. 19, 1996, at 6C. In Canada, aboriginal use of mass media will soon reach a new level, when the new Aboriginal Peoples Television Network begins broadcasting. See Miles Morrisseau, *Coming to a TV Screen Near You: The Aboriginal Peoples Television Network*, INDIAN COUNTRY TODAY, Mar. 15-Mar. 22, 1999, at A1. The network will broadcast programs in up to 15 aboriginal languages, as well as in French and English. See *id.*

⁵⁶⁹ See Brooke, *supra* note 292, at A22.

⁵⁷⁰ See *id.* (referring to the "Skomish").

⁵⁷¹ See *Software Designer Passes Language on*, BOSTON GLOBE, Aug. 21, 1998, at C11. Dine College in Shiprock, New Mexico has developed a CD-ROM to help high school students learn Navajo and is now working on materials for elementary school students. See *Navajo Language Legacy Preserved*, *supra* note 490, at C1. In Canada, the Manitoba Association for Native Languages has developed CD-ROM programs for learning Cree, Dakota, Dene, Michif, Ojibwe, Oji-Cree, and Saulteaux. See *Aboriginal Language Made Easy*, INDIAN COUNTRY TODAY, July 27-Aug. 3, 1998, at A6 (advertisement).

⁵⁷² See *Forensic Data Experts Offer, Reclaim Archives*, *supra* note 474, at C1.

⁵⁷³ See *id.* Tribal police blamed the vandalism on two 12-year-old boys. See *id.* A number of computer specialists offered to help try to recover information from the damaged diskettes, but as of September 1997 information had been recovered from only one diskette. See *id.*

profits from the tribe's casino, for teaching the tribe's language to children.⁵⁷⁴ There is enough demand for Native American language cassettes and other materials, that one international firm that produces self-instruction language programs offers materials in fifteen Native American languages.⁵⁷⁵

The Internet has also proved to be a useful medium for instruction and communication in Native American languages. For example, high school students in Tucson and Sells, Arizona are learning the O'odham language via the Internet.⁵⁷⁶ Members of the Cheyenne River Sioux Tribe have created an online "Introduction to Lakhota" text and audio course and an on-line dictionary.⁵⁷⁷ A Lakota chat room is also available on the Internet.⁵⁷⁸

While pursuing a variety of language preservation programs, Native American individuals, tribes, and other groups have also struggled against new threats to language diversity that could impact Native American languages. In a number of states, such as Alaska and Utah, Native Americans have spoken out against proposed state English-only legislation and other provisions. In Alaska, Native Alaskans and their allies organized a campaign against a ballot initiative to make English the official language of Alaska.⁵⁷⁹ Although the measure contained a reference to NALA, opponents were concerned that there was no specific exemption for Native Alaskan languages.⁵⁸⁰ In commenting in 1998 on

⁵⁷⁴ See Salopek, *supra* note 216, at 6A. Support for such innovations is not, however, universal within tribes. Some Ho-chunk Tribe members, for example, have objected to putting the tribe's language in computers. *See id.*

⁵⁷⁵ Audio-Forum, which has offices in the United States, England, Australia, and South Africa, offers cassettes and other materials for learning Cherokee, Chickasaw, Choctaw, Hawaiian, Jicarilla, Apache, Kiowa, Lakota, Lenape, Mohawk, Navajo, Ojibwe, Passamaquoddy, Salish, Tlingit, and Yup'ik. *See* AUDIO-FORUM, THE WHOLE WORLD LANGUAGE CATALOG 43-45 (1999).

⁵⁷⁶ See Norrell, *supra* note 500, at A1.

⁵⁷⁷ See <<http://www.lakhota.com/online>> (visited Oct. 24, 1999). The web page identifies "Lakhota" as the preferred spelling because the "h" behind the "k" encourages correct pronunciation. *See* <<http://www.lakhota.com/reference.htm#1>> (visited Aug. 18, 1999). It notes further that "Lakhota was strictly a spoken language until 1910 when Jesuit Priest Father Buechel of Thuringia, Germany began to collect and catalog Lakhota words with their English meanings." *Id.*

⁵⁷⁸ See Brooke, *supra* note 292, at A22.

⁵⁷⁹ See *English Initiative Fails to Safeguard Native Languages*, INDIAN COUNTRY TODAY, Sept. 28-Oct. 5, 1998, at B10.

⁵⁸⁰ *See id.* The ballot initiative was passed in November 1998 and has been challenged in a lawsuit brought by the Native American Rights Fund. *See Case Updates: Preliminary Injunction is Granted on Alaska's English Only Initiative*, NATIVE AM. RIGHTS FUND LEGAL REV., Winter/Spring 1999, at 5, 5. An Alaska state court judge has granted a preliminary injunction against enforcement of the initiative. *See id.* For an argument that state English only

an "English-only" bill introduced into the Utah state legislature, Sam Billison, the 1997 President of the Navajo Code Talkers Association, said that the Navajo code talkers volunteered in World War II "'so we could maintain our freedom of speech, freedom of religion and freedom to live under a democratic government.'"⁵⁸¹ Noting the changing, opportunistic attitudes of government toward Native American languages, Billison commented that "'[t]he Navajo Language contributed tremendously towards helping shorten the war Pray tell me, why then at that time, was there no effort for 'English Only' in the United States?'"⁵⁸² Navajo officials and representatives made similar comments in 1996, when ELEA was under consideration in Congress.⁵⁸³ The legislation, which had died in committee in the previous two sessions of the state legislature, drew opposition from Utah's eight tribes.⁵⁸⁴

In summary, Native American groups and individuals and their supporters have launched many, diverse efforts to preserve and revitalize their native languages. They have taken these actions because of the great importance that Native American languages play in tribal cultural preservation and self-determination. In the face of the general indifference of the federal government toward Native American language preservation, and the hostility toward linguistic diversity demonstrated by some federal and state legislators, Native Americans' efforts to preserve Native American languages give some hope that many languages can be saved from the eradication that past government officials intended for them.

referenda conflict with NALA and must include exceptions to protect Native American students' language rights, see Scott Ellis Ferrin, *Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda*, 28 J.L. & EDUC. 1 (1999).

⁵⁸¹ Rushton, *supra* note 494, at C2 (quoting Sam Billison).

⁵⁸² See *id.* (quoting Sam Billison).

⁵⁸³ See Katherine Saltzstein, *Navajo Warn Panel on English-Only Bill: Native Languages Threatened by Movement*, INDIAN COUNTRY TODAY, Apr. 16–Apr. 23, 1996, at C1. Leonard Chee, a Navajo tribal council delegate, commented as follows: "In World War II the Navajo language was used by code talkers. That's how we contributed to the war. Now they're saying Native languages can't be used. That's an insult to Native people across the country." See *id.*

⁵⁸⁴ See *Utah Tribes to Use Native Language*, INDIAN COUNTRY TODAY, Jan. 4–11, 1999, at C2.

V. CONCLUSION

I ka olelo no ke ola; I ka olelo no ka make.

In the language rests life; In the language rests death.⁵⁸⁵

—Hawaiian saying

During the nineteenth century, government officials and their allies began concerted efforts to eradicate allegedly inferior Native American languages. Government officials, missionaries, and educators were determined to suppress the languages and replace them with English, which they regarded as a unifying force and as a critical element in the efforts to civilize and assimilate Native Americans. They aimed, in short, to use words to “kill the Indian”—to transform Native Americans in keeping with the Euro-American model. Their hostility toward Native American languages was tied, at least in part, to hostility toward all languages other than English, and to a desire to use the “melting pot” to destroy the linguistic diversity in the United States that was bolstered by increasing numbers of immigrants. At least some of the students in the schools established by the government and others to educate Native Americans were not, however, as convinced as their teachers of the superiority of English, and their retention of their languages in the face of pressures that even included corporal punishment can be seen as a form of resistance to forced assimilation.

Government efforts to replace Native American languages with English continued into the twentieth century. Native American efforts to resist the suppression of their languages preserved many languages, but others have come to be in danger of extinction—a condition that has worsened for many as the century has progressed. In the 1940s, the federal government did recognize Native American languages as having some value, but only in a very limited context. During World War II, the government profited from the linguistic obscurity of Native American languages that it had promoted by its language eradication efforts when Navajo and other Native American code talkers used their languages in military communications, thus using their words as effective weapons against the enemies of the United States. The government’s appreciation of the usefulness of Native American languages in this context did not, however, result in respect for the languages, or apologies for past efforts to eradicate them, once World War II was over.

The enactment of the Native American Languages Act of 1990, with its strong statements of support for Native American languages, seemed to represent a long overdue break with the past. The absence from the statute of funding authorizations and program initiatives, however, cast into doubt the seriousness

⁵⁸⁵ 20 U.S.C. § 7902(19) (1994) (accent marks omitted).

of Congress' commitment to protecting Native American languages. Although the Native American Languages Act of 1992 finally provided for funding for language preservation programs, the amount of funding that has been made available has been woefully inadequate in light of the seriousness of the threat facing many languages and the culpability of the government in contributing to the languages' endangered status. In addition, another shortcoming of the 1990 statute, its failure to provide for a private cause of action, was highlighted in *Office of Hawai'ian Affairs v. Department of Education*.⁵⁸⁶ The Hawaii federal district court's conclusion that no implied private right of action existed under the statute cast into doubt once again the statute's effectiveness as a tool for redressing the effects of discrimination against Native American languages. Finally, the repeated introduction in Congress of English-only and official English bills, most recently in January 1999, suggests continued hostility of at least some lawmakers toward languages other than English, which may provide a new threat to Native American languages. Much of the rhetoric of nineteenth-century advocates of the English-only policy for Native Americans is echoed today in the arguments of the congressional supporters of this legislation, who also view linguistic diversity in the United States as a threat to the effectiveness of the melting pot, and to the national unity that they equate with uniformity.

In the face of less than enthusiastic support in Congress for the revitalization and protection of Native American languages, contemporary Native Americans have taken it upon themselves to establish a wide variety of programs to support their languages and save them from extinction. They face an uphill battle because of the toll that the government's English-only policy took on many languages. Numerous tribes, groups, and individuals have persevered, however, in the struggle to save Native American languages because of the importance of the languages' role in tribal culture, history, and religion, and in defining tribal and individual identity.

Thus, as the twentieth century draws to a close, Native Americans continue to struggle against yet another aspect of past, supposedly repudiated, government policies toward Native Americans that were aimed at exterminating all aspects of their culture and assimilating them into Euro-American society. If they think back to the policies launched in the nineteenth century, and then consider the government's failure in this century to make a substantial commitment to the preservation of Native American languages, together with the repeated introduction of English-only bills in Congress, they might well conclude that the war that was waged against Native American languages beginning in the nineteenth century has never really ended. Its tactics have simply changed, as an outright assault on the languages has been abandoned and replaced by a policy

⁵⁸⁶ 951 F. Supp. 1484 (D. Haw. 1996).

that essentially amounts to benign neglect.

Surely it is time, in light of the great importance of Native American languages to the preservation of Native American culture and to Native American identity, and the government's often repeated commitment to tribal self-determination, for the government to at last make a real commitment to Native American languages by providing increased funding and any other necessary assistance for language programs. Although individual tribes and Native American groups are in the best position to determine the types of programs that are most suited to their particular situations, increased support from the government will make it possible for the government to at last try to correct the damage that it worked so hard to achieve. Until the government makes this commitment, it will be perpetually reinscribing the relationship with Native Americans and their languages that it developed in the nineteenth century through what Michel Foucault termed "a form of unspoken warfare."⁵⁸⁷ In short, it will continue to be protecting the gains that it made in its war against Native American languages in the nineteenth and twentieth centuries, the lofty words of the Native American Languages Act of 1990 notwithstanding.

⁵⁸⁷ Michel Foucault, *Two Lectures*, in *POWER/KNOWLEDGE* 90 (1980), *quoted in* GETCHES ET AL., *FEDERAL INDIAN LAW CASES AND MATERIALS* 54 (3d ed. 1993).

